United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

DLB- Arg. Granted
12-21-70
(4)

28

No. 24098

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 859, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

ON PETITION FOR REVIEW AND ON CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

APPENDIX

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Laborers' Int'l Un. of North America, Local 859, AFL-CIO

Case Nos.: 16-CC-300, 16-CC-315 and 16-CC-327

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1.2.69	Charge filed in 16-CC-315
3.13.69	Charge filed in 16-CC-327
3.17.69	First amended charge filed in 16-CC-327
3.19.69	Second amended charge filed in 16-CC-327
3.28.69	Order consolidating cases, complaint & notice of hearing, dated
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1/ Petitioner herein, was Respondent before the Board.

D-3496
Dallas and
Fort Worth, Texas

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LABORERS INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 859, AFL-CIO

and

Case 16-CC-300

THOMAS S. BYRNE, INC.

LABORERS INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 859, AFL-CIO

and

Case 16-CC-315

THE CITADEL CONSTRUCTION COMPANY, INC.

LABORERS INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 859, AFL-CIO

and

Case 16-CC-327

DEE BROWN MASONRY, INC.

DECISION AND ORDER

On July 22, 1969, Trial Examiner A. Bruce Hunt issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that the complaint be dismissed as to them. Thereafter, only the Respondent filed exceptions to the Trial Examiner's Decision with a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts

the findings, conclusions, and recommendations of the Trial Examiner, with the following additional comments.

At issue in these cases is whether the Respondent violated Section 8 (b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended, in its course of conduct relating to its strike against McDonald Bros. Cast Stone Co. (herein called McDonald) during 1968 and 1969. For the most part, the facts are uncontroverted. Thomas S. Byrne, Inc. (herein called Byrne), The Citadel Construction Company, Inc. (herein Citadel), and Dee Brown Masonary, Inc. (herein Brown), contractors engaged in the building and construction industry, purchase stone from McDonald, which stone is usually delivered by McDonald to their respective jobsites. During the time of Respondent's strike against McDonald, the three contractors made arrangements with independent truckers to have stone delivered by the independent truckers from McDonald's to their jobsites.

During August 1968, Respondent threatened to picket Byrne for using McDonald stone. Later, when an independent hauler brought a load of McDonald stone to the Byrne jobsite, Respondent picketed with a sign directed only to employees of McDonald, although it knew no employees of McDonald were at the jobsite, causing employees of other contractors to cease work. The stone was not unloaded. Byrne filed a charge against the Respondent, but later joined in a settlement agreement approved by the Regional Director, in settlement of the charge.

In December 1968, when an independent hauler transported McDonald stone to the Citadel worksite, pickets of Respondent appeared, causing Citadel's employees to quit working. No employees of McDonald were at the site. After the truck was unloaded and left, the picketing ceased. Again a charge was filed against the Respondent, this time by Citadel, but a settlement agreement was executed by the parties and approved by the Regional Director.

In March 1969, Brown contracted to buy McDonald stone and arranged to have an independent hauler pick up the stone and deliver it to the Brown jobsite. Brown informed Respondent of those plans, but Respondent's agent informed Brown

that Respondent would "picket the stone whenever and wherever the opportunity presented itself." Another of Respondent's agents, stationed across the street from Brown's worksite, with a picket sign in his station wagon, informed Brown's foreman that he would picket if the stone was delivered there. Brown suspended his effort to have the stone delivered until after the charge was filed and a restraining order had issued by the United States District Court for the Northern District of Texas.

Thereafter Brown filed its charge against Respondent, and the Regional Director withdrew his approval of the previous settlement agreements involving Byrne and Citadel. The Trial Examiner found, and we agree, that Respondent's threats to Brown breached both settlement agreements, as those agreements contained provisions by which Respondent agreed not to picket "any other person engaged in commerce," with an object of forcing them to cease doing business with McDonald. We find, therefore, that the Regional Director acted properly in setting aside those settlement agreements and issuing the consolidated complaint herein.

Like the Trial Examiner, we find that Byrne, Citadel, and Brown were not "allies" for the purposes of McDonald's labor dispute with Respondent. Rather, the facts show that Byrne, Citadel, and Brown were neutral secondary employers and were merely engaged in doing business with McDonald, the primary employer. The delivery of McDonald stone by independent haulers engaged by Byrne, Citadel, and Brown, individually, and without encouragement or suggestion from McDonald, does not constitute "struck work." These three contractors arranged to have McDonald stone delivered to their respective jobsites by independent haulers. Although McDonald employees usually delivered stone, McDonald did not make any arrangements to have its stone delivered to any of its customers. The customers made the arrangements to have the product that they bought delivered to them. As we stated in Patton Warehouse,[1/] "/in/ the absence of any arrangement

1/ Truck Drivers Union Local No. 413, International Brotherhood of Teamsters, (Patton Warehouse, Inc), 140 NLRB 1474, 1483; 334 F.2d 539 (C.A. D.C.), cert. denied 379 U.S. 916.

between the struck and the secondary employers, the work previously performed by the struck employer may not be interfered with even though the secondary employees are performing a service which, but for the dispute, would customarily be performed by the employees of the struck employer." Therefore, we agree that the delivery of the stone, arranged for by the customers of McDonald, does not constitute struck work, and consequently Byrne, Citadel, and Brown are not allies of McDonald simply because they continued to exercise their right to purchase stone from McDonald. 2/

Accordingly, we adopt the Trial Examiner's findings that the Respondent violated Section 8(b)(4)(i)(B) of the Act by picketing the Byrne and Citadel jobsites with an object of forcing or requiring persons to cease doing business with McDonald, and that Respondent violated Section 8(b)(4)(ii)(B) of the Act by threatening Brown and Byrne with an object of forcing them to cease doing business with McDonald.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Laborers International Union of North America, Local 859, AFL-CIO, Dallas, Texas, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C
December 18, 1969

John H. Fanning, Member

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

2/ See Local 379, Building Material & Excavators, a/w International Brotherhood of Teamsters, (Catalano Bros., Inc.), 175 NLRB No. 74.

TXD-409-69
Dallas and
Fort Worth, Tex.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 859, AFL-CIO

and

THOMAS S. BYRNE, INC.

Case 16-CC-300

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 859, AFL-CIO

and

THE CITADEL CONSTRUCTION COMPANY, INC.

Case 16-CC-315

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 859, AFL-CIO

and

DEE BROWN MASONRY, INC.

Case 16-CC-327

David L. Evans, Esq., of Fort Worth, Tex., for the General Counsel.
Marvin Menaker, Esq. (Bader, Wilson, Menaker & Cox), of Dallas, Tex., for the Respondent.
Joseph P. Parker, Esq. (Sears & Parker), of Fort Worth, Tex., for Byrne and Citadel.
William L. Keller, Esq. (Clark, West, Keller, Sanders & Ginsberg), of Dallas, Tex., for Brown.

TRIAL EXAMINER'S DECISION

Statement of the Cases

A. BRUCE HUNT, Trial Examiner: These consolidated cases involve a single respondent, Laborers International Union of North America, Local 859, AFL-CIO. In each case, the Respondent is alleged to have violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151 et seq. 1/ On April 22, 1969, I conducted a hearing at Fort Worth, Texas. All parties were represented by counsel.

1/ The original charges were filed on August 7, 1968, and January 2 and March 13, 1969. Amended charges in Case 16-CC-327 were filed on March 17 and 19, 1969. The cases were consolidated and a complaint was issued on March 28, 1969.

Subsequently, briefs were filed by the General Counsel and the Respondent, and have been considered. As will appear, the Respondent executed, and the Regional Director approved but later set aside, settlement agreements involving the Respondent's conduct at sites where Thomas S. Byrne, Inc. and The Citadel Construction Company, Inc. were engaged in construction. As also will appear, I hold, contrary to the Respondent's contention, that the Regional Director did not err in setting aside the agreements. Upon the entire record and my observation of the witnesses, I make the following:

Findings of Fact

I. The various employers

A. The Primary Employer

Acme Brick Company d/b/a McDonald Bros. Cast Stone Co. (herein McDonald) is a division of First Worth Corporation, a Texas corporation, and maintains offices and places of business in Fort Worth where it is engaged in the building materials industry. McDonald annually receives goods and materials valued in excess of $50,000 that are transported to its plants directly from outside Texas. McDonald also annually sells products valued in excess of $50,000 that are delivered to points outside Texas. There is no dispute, and I find, that McDonald is engaged in commerce within the meaning of the Act.

B. The Other Employers

Thomas S. Byrne, Inc. (herein Byrne), The Citadel Construction Company, Inc. (herein Citadel), and Dee Brown Masonry, Inc. (herein Brown) are Texas corporations engaged in the building and construction industry. Byrne, Citadel and Brown have their principal offices at, respectively, Fort Worth, San Marcos and Dallas. During 1968, each of these employers received goods and materials valued in excess of $50,000 which were shipped to its places of business directly from points outside Texas. There is no dispute, and I find, that each of these employers is engaged in commerce within the meaning of the Act.

II. The Respondent

The Respondent, Local 859, is a labor organization which admits to membership employees of McDonald.

III. The Unfair Labor Practices

A. The Issues

The Respondent was twice certified by the Board as the representative of McDonald's production and maintenance employees, including patchers and truck drivers. The first certification was on November 6, 1967, in Case 16-RC-4728 wherein the Union filed the petition. The second certification was on the day immediately preceding the hearing, April 21, 1969, in Case 16-RM-389 wherein McDonald filed the petition. Negotiations between the Respondent and McDonald were unfruitful and, during July or August 1968, the Respondent began an economic strike. Both of McDonald's plants in Fort Worth were picketed. There is no issue concerning that picketing. The question is whether the Respondent's conduct relating to Byrne, Citadel and Brown, described below, constituted secondary activity in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

B. Events Involving Byrne

During August 1968, Byrne was engaged as the general contractor on a construction project for the Star Telegram, a newspaper in Fort Worth. Byrne had about 55 employees and 6 supervisors on the job. The stone that Byrne utilized on the project was purchased from McDonald and the normal practice had been for McDonald's employees to deliver the stone to the site in McDonald's trucks. On August 6, Byrne received from the Respondent a letter that recited, inter alia, that the Respondent had struck McDonald in an effort to obtain a collective labor agreement, that the latter's drivers spent most of their working hours in making deliveries, that the Respondent would picket McDonald's drivers, that the picketing would be directed at such drivers only, and that the Respondent would comply with the standards "for primary ambulatory picketing" established in Moore Dry Dock Co., 92 NLRB 547. (The standards established in that case are not applicable to our issues because no employees of McDonald appeared at any construction site, as related hereinafter. Thus, there was no common situs at which McDonald was engaged with other employers.) Upon receipt of the letter from the Respondent, James N. Patterson, president of Byrne, made arrangements with Bill Scroggins, a trucking contractor who hauls products for Byrne, to go to one of McDonald's plants and pick up stone. Additionally, someone on behalf of Byrne made an agreement with McDonald that the price of the stone to be hauled by Scroggins would be the usual price less Scroggins' charges. Scroggins went to McDonald's plant. Soon Patterson telephoned John Wallace, an agent of the Respondent. When the telephone connection was completed, Wallace said that he had been "about to call" Patterson. The latter asked what he had in mind, and Wallace replied that Byrne's truck was at McDonald's plant to pick up some stone and that, if the stone should be brought to the jobsite, it would be picketed. Patterson sought unsuccessfully to persuade Wallace not to engage in picketing. One of Patterson's arguments was that the letter from the Respondent had referred to picketing of McDonald's employees only, and Patterson said that neither employees nor trucks of McDonald would be on the site and that the stone would be hauled by Scroggins, "an independent trucking contractor." This argument did not persuade Wallace. Patterson then said that only three pieces of stone were needed to complete the day's work, that equipment and men were awaiting the stone, and he asked Wallace to refrain from picketing. Wallace replied that, if four or more pieces of stone were brought to the site, he would "put a picket on the job." 2/ Scroggins brought the three pieces of stone to the site without incident. Later on August 6, Patterson sent a telegram to the Respondent, saying that "until further notice" Byrne would purchase products from McDonald "F.O.B. McDonald plant" and that "/n/o truck, employee or sub-contractor of McDonald will be engaged in the delivery of products purchased by /Byrne/ to our job sites." Also on August 6, G. G. Adams, Byrne's superintendent at the site, talked with Lawrence O'Neil, the Respondent's business agent. O'Neil said that "if you bring any more of McDonald stone on the job /the Respondent would/ have to picket." Adams asked, "/o/n what ground?," adding that "/t/here is not any McDonald employees on the job." O'Neil answered, "/f/or using their stone."

2/ These and other findings are based upon the uncontradicted testimony of witnesses for the General Counsel unless the contrary is noted.

On the next day, August 7, Scroggins' truck brought a load of McDonald stone to the jobsite. A man picketed with a sign reading:

Don't Buy Products
of
McDonald Stone Products
UNFAIR
To Laborer's Local Union #859
This Picketing Is Directed Only
At Employees of McDonald
Stone Products

Laborer's Local Union #859

The picket walked as near as he could to the truck. No employees of McDonald were at the jobsite. About 40 employees of Byrne and 20 of another contractor ceased work, however. The truck was not unloaded, and Patterson directed someone to tell the driver to leave. Patterson telephoned Wallace and told him that the truck had been driven from the site. Wallace went to the site and stopped the picketing. The employees returned to work.

C. Events Involving Citadel

During December 1968, Citadel was engaged in the construction of a dormitory at North Texas State University at Denton, Texas. Citadel made arrangements with a hauler named Ben Loper to have Loper obtain the stone at McDonald's plant and deliver it to the jobsite. Citadel also arranged with McDonald to pay the latter the usual price for the stone less Loper's charges. On December 27, Loper brought a load of stone to the site. Pickets appeared, one at each of two gates. The record does not disclose the exact wording of the signs they carried, but it is clear that the signs referred to McDonald, not to Citadel, and that they bore the Respondent's name as the protesting labor organization. Frank Thomason, who was in charge of Citadel's work on the project, spoke to the pickets and one of them said that it would take an injunction to remove him. There were about 120 employees of Citadel on the job, and about 60 quit working during the picketing. There were no employees of McDonald at the site. Loper's truck was unloaded and left the site. The picketing ceased.

D. The Settlement Agreements

During August 1968, in Case 16-CC-300 involving Byrne, the parties executed a settlement agreement that was approved by the Regional Director. The agreement contained provisions that the Respondent would post a notice, that the Respondent would comply with the terms and provisions of the notice, and that, by entering into the agreement, the Respondent did not admit a violation of the Act. The notice, addressed to members of the Respondent, recited in substance that the Respondent would not, by picketing or like or related conduct, induce or encourage anyone employed by Byrne "or any other person engaged in commerce or in an industry affecting commerce" to engage in a work stoppage with an object of forcing or requiring Byrne "or any other employer or person" to cease doing business with McDonald. Additionally, the notice recited that the Respondent would not threaten, restrain or coerce Byrne or any other person engaged in commerce or in an industry affecting commerce with an object of forcing or requiring "said corporation" to cease doing business with

McDonald. During January 1969, in Case 16-CC-315 involving Citadel, the Respondent entered into a similar agreement, also approved by the Regional Director, with one distinction, i.e., there was no provision concerning threatening, coercing or restraining Citadel or any employer.

On March 18, 1969, the Regional Director withdrew his approval of the settlement agreements and set them aside on the ground that the Respondent had violated them. Ten days later, he issued the complaint. The basis of the Regional Director's action was the Respondent's conduct involving Brown, discussed hereinafter. 3/ On the other hand, the record is clear that the Respondent, after entering into the agreements, posted the notices as required and did not engage in invalid conduct toward Byrne or Citadel. As will appear, the Respondent contends that its conduct toward Brown did not constitute a violation of either agreement. We turn to that conduct.

E. Events Involving Brown

During March 1969, Brown was a subcontractor for masonry work valued at about $966,000 on a project for Southwestern Bell Telephone Company in Dallas. Brown had contracted to buy from McDonald stone valued at $115,000, the stone to be delivered by McDonald to the jobsite.

Upon various days on and after March 3, a striker and picket, Anthony Mullins, sat in a station wagon across the street from the jobsite. Mullins did not picket at the site at any time, nor has there been a delivery of McDonald stone except as described hereinafter. 4/ On March 12, Dewitt Brown, Jr., owner of Brown, telephoned R. P. Vinall, an agent of the Respondent. Brown, Jr. said to Vinall that he was "about ready to have stone delivered" to the jobsite, that he had arranged to buy the stone f.o.b. McDonald's plant, and that he would have an independent hauler pick up and deliver the stone. Brown, Jr. asked if Vinall would picket, and Vinall replied that the Respondent was "going to picket the stone whenever and wherever the opportunity presented itself." Brown, Jr. then said that he would "take whatever action that was available to /him/ under the law" to get the stone delivered and to perform his subcontract. Vinall replied, "I understand you have to do what you have to do and I have to do what I have to do." On the next day, March 13, Lawrence Drake, Brown's foreman at the jobsite, saw Mullins across the street in a station wagon and went over to talk. Drake asked if Mullins was "going to picket the job," to which Mullins replied in the negative and added that he would picket "the stone if it arrived on the job." Drake observed that a picket sign was in the station wagon. The exact wording of the sign is not disclosed in the transcript, but the record is clear that the sign differed from the one quoted above in that it did not contain the words "Don't Buy Products of McDonald Stone Products," but was similar to the quoted sign

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3/ The Regional Director acted pursuant to Section 101.9(e)(2) of the Board's Statements of Procedure which reads: "In the event the respondent fails to comply with the terms of an informal settlement agreement, the regional director may set the agreement aside and institute further proceedings." The Regional Director's authority to set aside a settlement agreement in a case where the facts warrant such action is well established, Wallace Corporation v. N.L.R.B., 323 U.S. 248, 253-55, 65 S.Ct. 238, 240-41; Pioneer Natural Gas Company, 158 NLRB 1067, 1068.

4/ The Respondent asserts that Mullins was not its agent. The Respondent concedes, however, that it sent Mullins to the jobsite, that he was paid for the time he spent there, and that at times he was the picket captain in the dispute with McDonald. I find that Mullins was its agent.

in that it characterized McDonald as unfair and professed to have been addressed only to McDonald's employees. 5/ Brown, Jr. suspended his efforts to have stone delivered to the jobsite by an independent trucker and he promptly filed the original charge in Case 16-CC-327. During the workweek beginning March 24, a trucker hired by Brown, Jr. delivered stone to the jobsite without incident, but it appears that this delivery took place after a restraining order had been issued against the Respondent in the United States District Court for the Northern District of Texas, Civil Action No. 3-3072-B. Brown, Jr's financial arrangement with McDonald was that he would pay the contract price for the stone less the amount charged by the trucker to pick up and deliver it. At the time of the hearing in the instant case, there had been no additional deliveries of stone to Brown. We come now to the Respondent's defenses.

F. The "Ally" Defense

Section 8(b)(4) provides in pertinent part that it shall be an unfair labor practice for a labor organization or its agents:

> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment . . . to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
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> * * * * *
>
> (B) forcing or requiring any person to cease . . . dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;
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> * * * * *
>
> . . . Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

5/ The findings concerning Drake's conversation with Mullins are based upon the former's uncontradicted testimony. On the other hand, there is testimony for the Respondent that two types of signs were prepared and given to each picket, that one sign was addressed to McDonald's employees and was for use when such employees delivered stone, and that the other sign referred to McDonald's products and was for use when another employer was delivering stone. Mullins was not a witness, however, and there is no testimony to contradict that of Drake that there was only one sign in the station wagon.

The Respondent points to the facts that it was McDonald's practice to deliver its products to the sites of Brown's operations, that the latter hired a trucker to make deliveries that had been performed by McDonald's striking employees, and that McDonald agreed to pay for such deliveries because the charges therefor were deducted by Brown from the contract price of the stone. As a consequence, the Respondent asserts, Brown was not a neutral or disinterested employer but injected itself into the labor dispute between the Respondent and McDonald. In its brief, the Respondent makes the same assertion concerning Byrne and Citadel, but its principal contention relating to those two employers is that the settlement agreements should not have been set aside. The question is whether the secondary employers (Brown, Byrne and Citadel) became allies of McDonald so that picketing at their jobsites was an appropriate extension of the primary picket lines at McDonald's plants. The initial ally case is Douds v. Metropolitan Federation of Architects, Engineers, Chemists & Technicians (Ebasco Services, Inc.), 75 F. Supp. 672 (S.D.N.Y., 1948). Later cases include N.L.R.B. v. Business Machine and Office Appliance Mechanics Conference Board, etc. (Royal Typewriter Co.), 228 F. 2d 553 (C.A. 2, 1955); N.L.R.B. v. Enterprise Association of Steam, etc. Pipefitters (Consolidated Edison Co.), 285 F. 2d 642 (C.A. 2, 1960); Truck Drivers Union Local No. 143, I.B.T.C.W.H.A. (Patton Warehouse, Inc.), 140 NLRB 1474; Brewery Workers Union No. 8, etc. (Bert P. Williams, Inc.), 148 NLRB 728; and Local 379, Building Material & Excavators, I.B.T.C.W.H.A. (Catalano Bros. Inc.), 175 NLRB No. 74. In Royal Typewriter, the struck employer, Royal, was obligated to repair typewriters that it had sold. After Royal's service employees went on strike, Royal's customers, by arrangement with Royal, selected other companies to do the repair work, and Royal paid the bills, in most instances by direct payments to the other companies. The Court, holding that certain companies were allies of Royal, said "that an employer is not within the protection of § 8(b)(4)(A) /8(b)(4)(B) in the current Act/ when he knowingly does work which would otherwise be done by the striking employees of the primary employer and where this work is paid for by the primary employer pursuant to an arrangement devised and originated by him to enable him to meet his contractual obligations /to his customers/. The result must be the same whether or not the primary employer makes any direct arrangement with the employers providing the services," 228 F. 2d at 559. The Royal Typewriter doctrine was followed in Bert P. Williams where Williams was found to have been an ally of the struck primary employer by contracting with that employer to perform struck work that the primary employer was required by a franchise agreement to perform. Although in Royal Typewriter and Williams the primary employers had obligated themselves before the strikes to perform work that later became struck work and that their allies agreed to perform, I do not believe that such obligation is controlling. The pertinent inquiry is whether one employer undertakes, by arrangement with a struck primary employer, to perform work that, absent the strike, would be performed by striking employees. As the Board said in Patton Warehouse, "an essential requirement of the ally doctrine . . . /is/ that the struck work must be transferred to a secondary employer through an arrangement with the primary employer," 140 NLRB at 1483, followed in Catalano Bros. That requirement is the key to our issue. McDonald did not make any arrangement with any trucker to have stone delivered to a jobsite. The arrangements were made by Brown, Byrne and Citadel. It is true that the truckers performed work that, absent the strike, McDonald's drivers would have performed. It also is true that McDonald bore the expenses of delivery because McDonald was reimbursed by his three customers upon the basis of the usual cost of the stone less the amounts charged by the truckers. These facts, however, did not change the status of the secondary employers from that of customers to that of allies. Those employers did not

undertake to perfoom generally the work of McDonald's striking drivers. They sought solely to continue as customers by utilizing the services of independent truckers to bring to them stone that they needed. "To bring these facts within the Ebasco-Royal doctrine would require a holding that . . . /Brown, Byrne or Citadel/ was somehow . . . /McDonald's/ agent, a holding that would fly in the face of reality," Consolidated Edison, 285 F. 2d at 645. Unquestionably, each of the secondary employers had the right to continue to purchase stone from McDonald. Surely too, each had the right to send any trucks it owned to McDonald's plant to pick up stone, assuming that its drivers would cross the picket line at the plant, and this right embodied the additional right to negotiate with McDonald a price for the stone f.o.b. the plant to replace the earlier price f.o.b. building site. I see no meaningful difference between these rights, on the one hand, and the arrangements made by the secondary employers with independent truckers, on the other. I hold that those employers, by making those arrangements, did not become allies of McDonald. To hold otherwise would be to hold that in an uncountable number of instances employers who are neutrals in a labor dispute would have to cease doing business with a struck primary employer. Such a result would be out of harmony with the Act.

G. The Consumer Picketing Defense

We have seen that no employee of McDonald was on a jobsite at any pertinent time. Therefore, each of the jobsites was a secondary site, not a common situs. The Respondent asserts that its conduct at the jobsites in picketing, and in threatening to picket, related solely to "identifiable stone product of the struck primary employer." The Respondent cites N.L.R.B. v. Fruit and Vegetable Packers and Warehousemen, Local 760 (Tree Fruits), 377 U.S. 58, 84 S.Ct. 1063 (1964). Although the proviso to Section 8(b)(4) quoted above contains the term "publicity, other than picketing," it is established that consumer or product picketing at a secondary site is valid under certain circumstances. Tree Fruits, supra; Milk Drivers and Dairy Employees' Local 680, I.B.T.C.W.H.A. (Woolley's Dairy), 147 NLRB 506, overturning an earlier decision in the same case, 145 NLRB 165. At the Byrne and Citadel jobsites, however, the picketing induced employees to cease work, and thereby the picketing was invalid under the terms of the proviso. At the Brown jobsite, on the other hand, picketing did not occur, and the question is whether there were invalid threats to picket. As we have seen, a picket, Mullins, sat in a station wagon across the street from the jobsite prepared to picket if McDonald stone had been brought to the site. Upon one occasion Mullins had a sign characterizing McDonald as unfair and professing to be addressed only to employees of McDonald. Additionally, a union agent, Vinall, told Brown, Jr. that the Respondent was "going to picket the stone whenever and wherever the opportunity presented itself," including Brown's jobsite. Consumer picketing at that site would have been valid only if addressed to customers of Brown, presumably Henger Construction Company with whom Brown had contracted to do the masonry work, the general contractor if other than Henger, and Southwestern Bell Telephone Company. Insofar as appears, the Respondent did not appeal to Brown's customers, and this is a fact to be considered in determining whether the Respondent intended to engage in lawful consumer picketing, Millmen & Cabinet Makers Union, Local No. 550 (Steiner Lumber Company), 153 NLRB 1285, 1286, enfd. 367 F. 2d 953 (C.A. 9). Additionally, and unlike the factual situation in Tree Fruits, the Respondent took no steps to assure that employees at the jobsite would not cease work in response to picketing. On the contrary, the picket sign in Mullins' possession was calculated to cause a work

stoppage if Brown had disregarded the threats of Mullins and Vinall and had caused McDonald stone to be delivered to the site. As recited, consumer picketing that causes a work stoppage by an employee of a secondary employer at a secondary site is not protected by the proviso. I find that the Respondent violated Section 8(b)(4)(ii)(B) by the threats to picket at Brown's jobsite.

H. Conclusions Concerning The Settlement Agreements

The Respondent's threats to Brown clearly breached the settlement agreement in Case 16-CC-300. The threats also constituted threats to breach the settlement agreement in Case 16-CC-315. It follows that the Regional Director acted properly in setting the agreements aside and in issuing the consolidated complaint as the initial step in obtaining an order requiring the Respondent to cease its invalid conduct.

Upon the above findings of fact and the entire record in the case, I make the following:

Conclusions of Law

1. The Respondent is a labor organization within the meaning of the Act.

2. The primary employer and each of the neutral employers is engaged in commerce within the meaning of the Act.

3. By inducing and encouraging individuals employed in industries affecting commerce to refuse in the course of their employment to perform services, with an object of forcing or requiring persons to cease doing business with McDonald, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i)(B) and Section 2(6) and (7) of the Act.

4. By threatening, coercing and restraining Brown and Byrne with an object of forcing or requiring said persons to cease doing business with McDonald, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(ii)(B) and Section 2(6) and (7) of the Act.

5. The Respondent did not violate Section 8(b)(4)(i)(B) in its conduct toward Brown, nor did it violate Section 8(b)(4)(ii)(B) in its conduct toward Citadel.

RECOMMENDED ORDER

Upon the entire record in the case and pursuant to Section 10(c) of the Act, and in order to effectuate the Act's policies, I recommend that Laborers International Union of North America, Local 859, AFL-CIO, its officers, agents and representatives, shall:

1. Cease and desist from:

(a) Inducing or encouraging employees of Thomas S. Byrne, Inc., The Citadel Construction Company, Inc., or any other individuals employed in an industry affecting commerce, to refuse, in the course of

their employment, to perform any service with the object of forcing or requiring any person to cease doing business with Acme Brick Company d/b/a McDonald Bros. Cast Stone Co.

(b) Threatening, coercing or restraining Thomas S. Byrne, Inc., Dee Brown Masonry, Inc., or any other person engaged in an industry affecting commerce, with the object of forcing or requiring any such person to cease doing business with Acme Brick Company d/b/a McDonald Bros. Cast Stone Co.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post in conspicuous places in its offices and meeting halls, including all places where notices to its members are posted, copies of the notice attached hereto as Appendix. 6/ Copies of said notice, to be prepared by the Respondent on forms furnished by the Regional Director for the Sixteenth Region, shall, after being signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for at least 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any material.

(b) Promptly after receipt of appropriate forms from said Regional Director, prepare signed copies of said notice and deliver them to the Regional Director for posting by Brown, Byrne and Citadel, if those employers be willing, at their respective places of business including all places where notices to their employees customarily are posted.

(c) Notify said Regional Director in writing within 20 days from the receipt of this Decision what steps the Respondent has taken to comply herewith. 7/

It is further recommended that the consolidated complaint be dismissed to the extent that it alleges unfair labor practices not found herein.

Dated at Washington, D. C.

July 22, 1969

A. Bruce Hunt
Trial Examiner

6/ In the event that these Recommendations be adopted by the Board, the words "A DECISION AND ORDER OF THE" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE" in the notice. In the further event that the Board's Order be enforced by a decree of court, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE" shall be substituted for the words "A DECISION AND ORDER OF THE".

7/ If these Recommendations be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

FORM NLRB-4634
(1-65)

APPENDIX

TXD-409-69

NOTICE

PURSUANT TO

THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

(AS AMENDED)

WE HEREBY NOTIFY ALL OUR MEMBERS, OFFICERS AND AGENTS, AND DEE BROWN MASONRY, INC., THOMAS S. BYRNE, INC., AND THE CITADEL CONSTRUCTION COMPANY, INC., AND THEIR EMPLOYEES, THAT

WE WILL NOT induce or encourage any employees of Thomas S. Byrne, Inc., The Citadel Construction Company, Inc., or any other individuals employed in an industry affecting commerce, to refuse, in the course of their employment, to perform any service with the object of forcing or requiring any person to cease doing business with McDonald Bros. Cast Stone Co.

WE WILL NOT threaten, coerce or restrain Dee Brown Masonry, Inc., Thomas S. Byrne, Inc., or any other person engaged in an industry affecting commerce, with the object of forcing or requiring any such person to cease doing business with McDonald Bros. Cast Stone Co.

LABORERS INTERNATIONAL UNION OF NORTH AMERICA,
LOCAL 859, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 8A24 Federal Office Building, 819 Taylor Street, Fort Worth, Texas 76102 (Tel. No. (817) 334-2941).

FORM NLRB-508
(12-65)

Form Approved
Budget Bureau No. 64-R003.12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 16-CC-300

Date Filed August 7, 1968

1. LABOR ORGANIZATION OR ITS AGENT AGAINST WHOM CHARGE IS BROUGHT

a. Name	b. Union Representative to Contact	c. Phone No.
Laborers' International Union of North America, Local 859	J. M. Breeding John Wallace	336-7092

d. Address (Street, city, State and ZIP code)

916 Burnet, Fort Worth, Texas

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (4)(i)(ii) (List Subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about August 6, 1968, and at all times thereafter, the above-named labor organization, by its officers, agents, representatives and members, has engaged in and/or induced or encouraged individuals employed by Thomas S. Byrne, Inc. and others * (employers) who is engaged in commerce or industry effecting commerce, to engage in a strike or a refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to otherwise perform any services and an object on or about August 6, 1968, said labor organization has been, in coerced, or restrained, Thomas S. Byrne, Inc. a person engaged in commerce or an industry effecting commerce, where an object thereof is to force or require Thomas S. Byrne, Inc. to cease using, handling, transporting, or otherwise dealing in products of McDonald Brothers Stone Products Co., Inc., 3501 Fairview, Fort Worth, Texas, and/or cease doing business with McDonald Brothers Stone Products Co., Inc.

* General Engineering Corporation, P. O. Box 447, Fort Worth, Texas

3. Name of Employer
Thomas S. Byrne, Inc.

4. Location of Plant Involved (Street, city, State and ZIP code)
Fort Worth Star Telegram Addition, Sixth at Taylor, Fort Worth, Tex

5. Type of Establishment (Factory, mine, wholesaler, etc.) — 6. Nature of / Principal Product or Service — 7. No. of workers employed

General Contractor — Commercial Construction — 100

8. Full Name of Party Filing Charge
Thomas S. Byrne, Inc.

9. Address of Party Filing Charge (Street, city, State and ZIP code) — Telephone No.

1307 Ft. Worth Natl. Bank Bldg., Fort Worth, Tex. 76102 — 335-8194

10. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By [signature] — Attorney
(Signature of representative or person making charge) — (Title or office, if any)

Franklin R. Sears
1901 Commerce Bldg.
Fort Worth, Texas 76102

Address — EDison 6-[illegible] — August 7, 1968
(Telephone number) — (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 871-857

August 7, 1951

[illegible]

Re: [illegible]
Case No. 22-CA-[illegible]

Board Agent Assigned: [illegible]
Telephone Number: [illegible]

Gentlemen:

This is to inform you that a charge, a true copy of which is enclosed, was filed in the above-entitled matter.

This case has been assigned to the Board Agent shown above, who will contact you in the investigation of this matter. Please cooperate with him so that all fact of the case may be considered.

This is a statutory priority case which requires immediate investigation.

Attention is called to your right, and the right of any party, to be represented by counsel or other representative in any proceeding before the National Labor Relations Board and the Courts. In the event you choose to have a representative appear on your behalf, please have your representative complete "Notice of Appearance" Form NLRB-4701 and forward it promptly to this office.

You should furnish us promptly a full and complete written account of the facts and a statement of your position in respect to the allegations set forth in the Charge. Attached is a statement briefly setting forth procedures followed in the processing of unfair labor practice charges, which we trust will be helpful to you.

Sincerely yours,

Elmer Davis
Regional Director

Enclosures (2)
REGISTERED RETURN
RECEIPT REQUESTED

cc: [illegible]

I certify that I served the Charge herein referred to on the above date by post paid registered mail on the addressee together with a transmittal letter of which this is a true copy.

[illegible]

Subscribed and sworn to before me this [illegible] day of [illegible] 1951.

[illegible]
Designated Agent

JA-17

FORM NLRB-508
(12-65)

Form Approved
Budget Bureau No. 64-R003.12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 16-CC-315

Date Filed January 2, 1969

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHOM CHARGE IS BROUGHT

a. Name	b. Union Representative to Contact	c. Phone No.
Laborers' International Union of North America, Local 859 and J. M. Breeding, Business Agent	J. M. Breeding	336-7092

d. Address (Street, city, State and ZIP code)

916 Burnet, Fort Worth, Texas

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (4)(i)(ii)(B) (List Subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about December 27, 1968, and at all times thereafter, the above-named labor organization, by its officer, agents, representatives, members, and business agents, has engaged in and/or induced or encouraged individuals employed by Citadel Construction Company, Inc. and who is engaged in commerce or industry effecting commerce, to engage in a strike or a refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to otherwise perform any services and since on or about December 27, 1968, said labor organization threatened, coerced, or restrained, The Citadel Construction Company, Inc. a person engaged in commerce or in industry effecting commerce where an object thereof is to force or require The Citadel Construction Company, Inc. to cease using, handling, transporting, or otherwise dealing in products of McDonald Brothers Stone Products Co., Inc., 3501 Fairview, Fort Worth, Texas, and/or cease doing business with McDonald Brothers Stone Products Co., Inc.

3. Name of Employer
The Citadel Construction Company, Inc.

4. Location of Plant Involved (Street, city, State and ZIP code)
1600 Maple Street, Denton, Texas Phone Number: 817 387-5779

5. Type of Establishment (Factory, mine, wholesaler, etc.)	6. Identify Principal Product or Service	7. No. of Workers Employed
Construction at N.T.S.U.	Construction	125

8. Full Name of Party Filing Charge
The Citadel Construction Company, Inc. Mr. Stanley Schuster

9. Address of Party Filing Charge (Street, city, State and ZIP code)
P. O. Box 1138, San Marcos, Texas 78666

10. Telephone No.
AC 817
387-5779

11. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By _____ _____
(Signature of representative or person making charge) (Title or office, if any)

Joseph P. Parker

Address 1801 Commerce Bldg. Fort Worth, Texas 336-4683 January 2, 1969
(Telephone number) (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 661-957

C

January 2, 1969

Laborers' International Union of North
America, Local 96, and Jo... Robinson,
Business Agent
910 Summit
Fort Worth, Texas

Re: [illegible] (TCP) & Associates, Agents
[illegible]
Board Agent Assigned: [illegible], Attorney
Telephone Number: [illegible]

Gentlemen:

This is to inform you that a charge, a true copy of which is enclosed, was filed in the above-entitled matter.

This case has been assigned to the Board Agent shown above, who will contact you in the investigation of this matter. Please cooperate with him so that all fact of the case may be considered.

<u>This is a statutory priority case which requires immediate investigation</u>.

Attention is called to your right, and the right of any party, to be represented by counsel or other representative in any proceeding before the National Labor Relations Board and the Courts. In the event you choose to have a representative appear on your behalf, please have your representative complete "Notice of Appearance" Form NLRB-4701 and forward it promptly to this office.

You should furnish us promptly a full and complete written account of the facts and a statement of your position in respect to the allegations set forth in the Charge. Attached is a statement briefly setting forth procedures followed in the processing of unfair labor practice charges, which we trust will be helpful to you.

Sincerely yours,

cc: [illegible]
[illegible]
[illegible]

[illegible]
[illegible]

Enclosures (3)
REGISTERED RETURN
RECEIPT REQUESTED

cc: [illegible]
[illegible]

I certify that I served the Charge herein referred to on the above date by post paid registered mail on the addressee together with a transmittal letter of which this is a true copy.

_____

Subscribed and sworn to before me this _____ day of _____ 19__.

_____
Designated Agent

FORM NLRB-508
(12-68)

Form Approved
Budget Bureau No. 64-R003.12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 16-CC-327

Date Filed March 13, 1969

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name	b. Union Representative to Contact	c. Phone No.
LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 859	R. P. Vinall, Intl. Repr.	EDison 6-4029

d. Address (Street, city, State and ZIP code)
Sinclair Building
Fort Worth, Texas 76102

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (1)(A)(B) (List Subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about March 12, 1969, said labor organization threatened, coerced, and restrained Dee Brown Masonry, Inc., a person engaged in commerce or an industry affecting commerce, where an object thereof is to force or require Dee Brown Masonry, Inc. to cease using, selling, handling, transporting, or dealing in the products of McDonald Bros. Cast Stone Co. or to cease doing business with McDonald Bros. Cast Stone Co.

3. Name of Employer
DEE BROWN MASONRY, INC.

4. Location of Plant Involved (Street, city, State and ZIP code)
P. O. Box 28335, Dallas, Texas 75228

5. Type of Establishment (Factory, mine, wholesaler, etc.)	6. Identify Principal Product or Service	7. No. of Workers Employed
Construction Industry	Construction	above 100

8. Full Name of Party Filing Charge
Dee Brown

9. Address of Party Filing Charge (Street, city, State and ZIP code)	10. Telephone No.
P. O. Box 28335 Dallas, Texas 75228	321-6443

11. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By _____ President
(Signature of representative or person making charge) (Title or office, if any)

Address Dee Brown
P. O. Box 28335, Dallas, Texas 75228 321-6443 _____
(Telephone number) (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 861-857

[redacted], March 25, 1980

[redacted]

Re: [redacted]
[redacted]

Board Agent Assigned: David L. Evans, Examiner
Telephone Number: [redacted]

Gentlemen:

This is to inform you that a charge, a true copy of which is enclosed, was filed in the above-entitled matter.

This case has been assigned to the Board Agent shown above, who will contact you in the investigation of this matter. Please cooperate with him so that all fact of the case may be considered.

<u>This is a statutory priority case which requires immediate investigation.</u>

Attention is called to your right, and the right of any party, to be represented by counsel or other representative in any proceeding before the National Labor Relations Board and the Courts. In the event you choose to have a representative appear on your behalf, please have your representative complete "Notice of Appearance" Form NLRB-4701 and forward it promptly to this office.

You should furnish us promptly a full and complete written account of the facts and a statement of your position in respect to the allegations set forth in the Charge. Attached is a statement briefly setting forth procedures followed in the processing of unfair labor practice charges, which we trust will be helpful to you.

Sincerely yours,

[redacted]

Enclosures (3)
REGISTERED RETURN
RECEIPT REQUESTED

cc: [redacted]

I certify that I served the Charge herein referred to on the above date by post paid registered mail on the addressee together with a transmittal letter of which this is a true copy.

[redacted]

Subscribed and sworn to before me this 14th day of [redacted] 1980

[redacted]
Designated Agent

JA-21

FORM NLRB-508 (12-65)

Form Approved
Budget Bureau No. 64-R003.12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

FIRST AMENDED CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 16-CC-327

Date Filed March 17, 1969

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name	b. Union Representative to Contact	c. Phone No.
LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 859	R. P. Vinall, Intl. Repr.	EDison 6-4029

d. Address (Street, city, State and ZIP code)
Sinclair Building
Fort Worth, Texas 76102

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (4)(i)(B) (List Subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about March 12, 1969, said labor organization threatened, coerced, and restrained Dee Brown Masonry, Inc., a person engaged in commerce or an industry affecting commerce, where an object thereof is to force or require Dee Brown Masonry, Inc. to cease using, selling, handling, transporting, or dealing in the products of Acme Brick Company d/b/a McDonald Bros. Cast Stone Co. or to cease doing business with Acme Brick Company d/b/a McDonald Bros. Cast Stone Co.

3. Name of Employer
DEE BROWN MASONRY, INC.

4. Location of Plant Involved (Street, city, State and ZIP code)
P. O. Box 28335, Dallas, Texas 75228

5. Type of Establishment (Factory, mine, wholesaler, etc.)	6. Identify Principal Product or Service	7. No. of Workers Employed
Construction industry	Construction	above 100

8. Full Name of Party Filing Charge
Dee Brown

9. Address of Party Filing Charge (Street, city, State and ZIP code)	10. Telephone No.
P. O. Box 28335 Dallas, Texas 75228	321-6443

11. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By _____ President
(Signature of representative or person making charge) (Title or office, if any)

Dee Brown
Address P. O. Box 28335, Dallas, Texas ~~75228~~ 321-6443 _____
(Telephone number) (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 881-957

c 1(a)

March 17, 1980

Re:

Board Agent Assigned:

Gentlemen:

The Charge in the above-captioned case has been amended, and a copy is enclosed for your information.

Thank you for your cooperation in this matter.

Sincerely yours,

Enclosure

REGISTERED RETURN
RECEIPT REQUESTED

cc:

I certify that I served the Charge herein referred to on the above date by post paid registered mail on the addressee together with a transmittal letter of which this is a true copy.

Subscribed and sworn to before me this 18th day of March 19 80.

Designated Agent

16

FORM NLRB-508
(12-65)

Form Approved
Budget Bureau No. 64-R003.12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

SECOND AMENDED

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 16-CC-327

Date Filed March 19, 1969

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name	b. Union Representative to Contact	c. Phone No.
LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 859, AFL-CIO	R. P. Vinall, Intl. Repr.	EDison 6-4029

d. Address (Street, city, State and ZIP code)
Sinclair Building or 916 Burnet
Fort Worth, Texas 76102

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) 8(b)(4)(ii)(B) (List Subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about March 12, 1969, said labor organization threatened, coerced, and restrained Dee Brown Masonry, Inc., a person engaged in commerce or an industry affecting commerce, where an object thereof is to force or require Dee Brown Masonry, Inc. to cease using, selling, handling, transporting, or dealing in the products of Acme Brick Company d/b/a McDonald Bros. Cast Stone Co. or to cease doing business with Acme Brick Company d/b/a McDonald Bros. Cast Stone Co.

3. Name of Employer
DEE BROWN MASONRY, INC.

4. Location of Plant Involved (Street, city, State and ZIP code)
P. O. Box 28335, Dallas, Texas 75228

5. Type of Establishment (Factory, mine, wholesaler, etc.)	6. Identify Principal Product or Service	7. No. of Workers Employed
Construction industry	Construction	above 100

8. Full Name of Party Filing Charge
Dee Brown Masonry, Inc.

9. Address of Party Filing Charge (Street, city, State and ZIP code)	10. Telephone No.
P. O. Box 28335 Dallas, Texas 75228	321-6443

11. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By _____ President
(Signature of representative or person making charge) (Title or office, if any)

Address Dee Brown
P. O. Box 28335, Dallas, Texas 75228 321-6443 _____
(Telephone number) (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 861-957

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SIXTEENTH REGION

LABORERS INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 859, AFL-CIO

and Case No. 16-CC-300

THOMAS S. BYRNE, INC.

LABORERS INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 859, AFL-CIO

and Case No. 16-CC-315

THE CITADEL CONSTRUCTION COMPANY, INC.

LABORERS INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 859, AFL-CIO

and Case No. 16-CC-327

DEE BROWN MASONRY, INC.

ORDER CONSOLIDATING CASES,
COMPLAINT AND NOTICE OF HEARING

It having been charged in Case No. 16-CC-300 by Thomas S. Byrne, Inc., herein called Byrne, in Case No. 16-CC-315 by The Citadel Construction Company, Inc., herein called Citadel, and in Case No. 16-CC-327 by Dee Brown Masonry, Inc., herein called Brown, that Laborers International Union of North America, Local 359, AFL-CIO, herein called the Respondent, has engaged in and is engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, by the undersigned Regional Director of the Sixteenth Region, having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act and to avoid unnecessary cost and delay, hereby orders, pursuant to Section 102.33 of the Board's Rules and Regulations, Series 8, that these cases be, and they hereby are, consolidated:

Said cases having been consolidated for hearing, the General Counsel of the Board, on behalf of the Board, by the undersigned Regional Director, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations, Series 8, Section 102.15, hereby issues this Consolidated Complaint and Notice of Hearing and alleges as follows:

1.

(a) The charge in Case No. 16-CC-300 was filed by Thomas S. Byrne, Inc. on August 7, 1968, and served on Respondent by registered mail on or about August 7, 1968.

(b) The charge in Case No. 16-CC-315 was filed on January 2, 1969 by The Citadel Construction Company, Inc. and served on Respondent by registered mail on or about January 2, 1969.

(c) The original, first amended and second amended charges in Case No. 16-CC-327 were filed by Dee Brown Masonry, Inc. on March 13, 1969, March 17, 1969, and March 19, 1969, respectively, and served on Respondent by registered mail on or about March 13, 17, and 19, 1969, respectively.

2.

Respondent is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3.

(a) Thomas S. Byrne, Inc., is a corporation incorporated in the State of Texas, maintaining its principal office at 1307 Fort Worth National Bank Building, Fort Worth, Texas, where it is engaged in the building and construction industry.

(b) The Citadel Construction Company, Inc., is a corporation incorporated in the State of Texas, maintaining its principal office and place of business at 1914 Interstate 35 South, San Marcos, Texas, where it is engaged in the building and construction industry.

(c) Dee Brown Masonry, Inc., is a corporation incorporated in the State of Texas, maintaining its principal office and place of

business at 12411 Shiloh Road, in the City of Dallas, Texas, where it is engaged in the building and construction industry.

(d) Acme Brick Company d/b/a McDonald Bros. Cast Stone Co. (herein called McDonald) is a division of First Worth Corporation, a corporation incorporated in the State of Texas, maintaining its principal offices and places of business at 2821 West Seventh Street and 3501 Fairview, Fort Worth, Texas, where it is engaged in the building materials industry.

4.

(a) During the past year, which period is representative of all times material herein, Byrne, in the operation of its business, received goods and materials valued in excess of $50,000 which were transported to its plant directly from states of the United States other than the State of Texas.

(b) During the past year, Citadel, in the course and conduct of its business operation, received goods and materials valued in excess of $50,000 which were transported to its plant directly from states of the United States other than the State of Texas. In the same period of time, Citadel sold products and performed services valued in excess of $50,000 which were delivered to and performed in states of the United States other than the State of Texas.

(c) During the past year, Brown received goods and materials valued in excess of $50,000 which were transported to its plant from states of the United States other than the State of Texas. During the same period of time, Brown sold products and delivered services valued in excess of $50,000 which were delivered to and performed in states of the United States other than the State of Texas.

(d) During the past year, which period is representative of all times material herein, Acme Brick Company d/b/a McDonald Bros. Cast Stone Co., in the operation of its business, annually received goods and materials valued in excess of $50,000 which were transported to its

plants directly from states of the United States other than the State of Texas. During the same period of time, McDonald sold products valued in excess of $50,000 which were delivered to states of the United States other than the State of Texas.

5.

Byrne, Citadel, Brown, and McDonald are now, and have been at all times material herein, persons engaged in commerce within the meaning of Sections 2(6) and 2(7) and 8(b)(4) of the Act.

6.

At all times material herein R. P. (Bud)Vinall, John Wallace, Anthony Mullins, and Lawrence O'Neil are and have been agents of Respondent acting on its behalf and are agents within the meaning of Section 2(13) of the Act.

7.

Since on or about August 1, 1968, Respondent has been engaged in a labor dispute with McDonald based upon its demand that McDonald recognize and bargain with Respondent as the representative of all its production and maintenance employees, including patchers and truckdrivers.

8.

Respondent has been certified by the Board as the collective bargaining representative of the production and maintenance employees of McDonald including patchers and truckdrivers, but at no time material herein has the Board issued an order directing McDonald to bargain with Respondent as the representative of any of its employees.

9.

At no time material herein has Respondent had any labor dispute with Byrne, Citadel, or Brown.

10.

On or about August 6, 1968, Respondent, by its officers and agents, Lawrence O'Neil and John Wallace, orally threatened Byrne with picketing of its construction site at the Fort Worth Star Telegram

building job site in Fort Worth, Texas, if Byrne continued to use, purchase, sell, handle, transport, or otherwise deal in the products of, or do business with, McDonald.

11.

On or about August 7, 1968, Respondent, by its officers, agents and representatives, picketed Byrne's construction site at the Fort Worth Star Telegram building job site, Fort Worth, Texas.

12.

On or about December 27, 1968, Respondent picketed Citadel's construction site at the campus of North Texas State University in Denton, Texas.

13.

An object of the acts and conduct engaged in by Respondent as set forth in paragraphs 10, 11 and 12, above, is, and has been, to force or require Byrne and Citadel and other persons engaged in commerce or in industries affecting commerce to cease using, selling, handling, transporting or otherwise dealing in the products of, and to cease doing business with, McDonald.

14.

Respondent executed and entered into settlement agreements in Case Nos. 16-CC-300 and 16-CC-315, which were approved by the Regional Director of the Sixteenth Region of the Board, on or about July 19, 1968, and January 17, 1969, respectively, providing for Respondent to post a notice specifying, inter alia, that Respondent would not, by picketing or other like related conduct, induce or encourage any individual employed by Thomas S. Byrne, Inc., The Citadel Construction Company, Inc., or any other person engaged in commerce or industry affecting commerce, to engage in a strike or refusal to work in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on goods or articles, materials or commodities, or to

perform any services where an object thereof is to force or require Thomas S. Byrne, Inc., or The Citadel Construction Company, Inc., or any other employer or person engaged in commerce to cease doing business with McDonald Bros. Cast Stone Co. Said settlement agreements further provided that the Union would not threaten, coerce, or restrain Thomas S. Byrne, Inc., or any other person engaged in commerce or an industry affecting commerce where an object thereof is to force or require said corporation to cease doing business with McDonald Bros. Cast Stone Co.

15.

On or about March 12, 1969, Respondent, by its officer, agent and representative, R. P. (Bud) Vinall, and on March 13, 1969, by its officer, agent and representative, Anthony Mullins, threatened to picket the construction site of Dee Brown Masonry, Inc. at the construction site of the Dallas Toll Building of the Southwestern Bell Telephone Company in Dallas, Texas, where Brown is engaged as brick, stone and masonry subcontractor.

16.

An object of of the acts and conduct engaged in by Respondent as set forth in paragraph 15 above is and has been to force or require Brown, and other persons engaged in commerce or industries affecting commerce, to cease using, selling, handling, transporting, or otherwise dealing in the products of, and to cease doing business with, McDonald.

17.

By the acts and conduct set forth in paragraphs 15 and 16, Respondent violated the terms of the settlement agreements set forth in paragraph 14 above.

18.

On March 25, 1969, the Regional Director for the Sixteenth Region vacated and set aside in all respects the provisions of the settlement agreements referred to in paragraph 14 above.

19.

By the acts described above in paragraphs 10, 11, 12, 13, 15, and 16, and by each of said acts, Respondent did engage in, and is engaging in, and did induce and encourage, and is inducing and encouraging, individuals employed by persons engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform services, and did threaten, coerce and restrain, and is threatening, coercing and restraining persons engaged in commerce or in an industry affecting commerce where an object thereof is the forcing or requiring another employer to recognize or bargain with a labor organization as the representative of its employees, and did engage in, and is engaging in, an unfair labor practice within the meaning of Section 8(b)(4)(i)(ii)(B) and Section 2(6) and (7) of the Act.

20.

The acts of Respondent described above in paragraphs 10, 11, 12, 13, 15, 16, 17 and 19, occurring in connection with the operations of Byrne, Citadel, Brown, and McDonald, described in paragraphs 3 and 4 above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

PLEASE TAKE NOTICE that on the 15th day of April 1969, at ten o'clock in the forenoon (CST) in Room 8A24, 819 Taylor Street, in the City of Fort Worth, Texas, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB--4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases as taken from the Board's Published Rules and Regulations and Statements of Procedure, is attached.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, the Respondent shall file with the Regional Director for the Sixteenth Region, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to said Complaint within ten (10) days from the service thereof and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

DATED AT Fort Worth, Texas, this 28th day of March 1969.

Elmer Davis, Regional Director
National Labor Relations Board
Sixteenth Region
Room 8A24, Federal Office Building
819 Taylor Street
Fort Worth, Texas 76102

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SIXTEENTH REGION

LABOROERS INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 859, AFL-CIO

AND

Case No. 16-CC-300

THOMAS S. BYRNE, INC.

LABORERS INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 859, AFL-CIO

AND

Case No. 16-CC-315

THE CITADEL CONSTRUCTION COMPANY, INC.

LABORERS INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 859, AFL-CIO

AND

Case No. 16-CC-327

DEE BROWN MASONRY, INC.

ANSWERS OF RESPONDENT, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 859, AFL-CIO

1.

Admitted.

2.

Admitted.

3.

(a) Admitted.

(b) Admitted.

(c) Admitted.

(d) Admitted.

4.

(a) Respondent cannot admit or deny.

(b) Respondent cannot admit or deny.

(c) Respondent cannot admit or deny.

(d) Respondent cannot admit or deny.

5.

Respondent cannot admit or deny.

6.

Denied.

7.

Respondent admits that it has had a primary labor dispute with McDonald Stone Company since on or about August 1, 1968. At that time McDonald was recognizing and bargaining with Respondent and to that extent paragraph 7 is denied.

8.

Admitted to the extent that Respondent has been certified by the Board. The Board has not issued an order directing McDonald to bargain for the reason that McDonald did, for a period of time, bargain with Respondent.

9.

Admitted.

10.

Denied.

11.

Denied.

12.

Denied.

13.

Denied.

14.

Admitted.

15.

Denied.

16.

Denied.

17.

Denied.

18.

Respondent admits that the Regional Director for the

Sixteenth Region attempted to set aside settlement agreements referred to in paragraph 14.

19.

Denied.

20.

Denied.

DATED AT Dallas, Texas, this 4 day of Oct, 1969.

MARVIN MENAKER
211 North Ervay Building (Suite 520)
Dallas, Texas 75201

Attorney for Respondent

NLRB-859
(6-54)

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SIXTEENTH REGION

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 859	
and	
THOMAS S. BYRNE, INC.	Case No. 16-CC-300
and	
THE CITADEL CONSTRUCTION COMPANY, INC.	Case No. 16-CC-315
and	
DEE BROWN MASONRY, INC.	Case No. 16-CC-327

ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that the hearing in the above-entitled matter be and the same hereby is rescheduled from April 16, 1969, to April 22, 1969, at the same time and place.

DATED at Fort Worth, Texas this 9th day of April, 1969.

Elmer Davis, Regional Director,
National Labor Relations Board

JA-36

GPO 842-241

Re: Laborers Int'l Union of North America, AFL-CIO, Local 859
Cases 16-CC-300, 315, 327

INDEX AND DESCRIPTION OF FORMAL DOCUMENTS

General Counsel Exhibit 1(a) - Original Charge, Case 16-CC-300, 3/7/68

1(b) - Affidavit of Service of 1(a), 3/7/69

1(c) - Original Charge, 16-CC-315, 1/2/69

1(d) - Affidavit of Service of 1(c), 1/2/69

1(e) - Original Charge, 3/13/69, Case 3/13/69

1(f) - Affidavit of Service of 1(e), 3/13/69

1(g) - First Amended Charge, Case 16-CC-327, 3/17/69

1(h) - Affidavit of Service of 1(g), 3/17/69

1(i) - Second Amended Charge, Case 16-CC-327, 3/19/69

1(j) - Affidavit of Service of 1(i), 3/19/69

1(k) - Order Consolidating Cases, Complaint and Notice of Hearing, Cases Nos. 16-CC-300, 16-CC-315 and 16-CC-327, 3/20/69

1(l) - Affidavit of Service of 1(k), 3/20/69

1(m) - Respondent's Answer to 1(k), 4/3/69

1(n) - Order Rescheduling Hearing, 4/9/69

1(o) - Affidavit of Service of 1(n), 4/9/69

1(p) - Index and Description of Formal Documents

Declined to Introduce (General's 1(a) - 1(p))

Laborers' Int'l Union of AFL-CIO, Local 859

[illegible]

COMPLIANCE WITH NOTICE—The Union will comply with all the terms and provisions of said Notice. [illegible]

[illegible]

REFUSAL TO ISSUE COMPLAINT—In the event the Charging Party fails or refuses to become a party to this Agreement, and if the Regional Director in his discretion believes it will effectuate the policies of the National Labor Relations Act, he shall decline to issue a Complaint herein and this Agreement shall be between the Union and the undersigned Regional Director. A review of such action may be obtained pursuant to Section 102.19 of the Rules and Regulations of the Board if a request for same is filed within ten (10) days thereof. This Agreement is contingent upon the General Counsel sustaining the Regional Director's action in the event of a review.

PERFORMANCE—Performance by the Union with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or, in the event the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Union of advice that no review has been requested or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE—The undersigned parties to this Agreement will each notify the Regional Director in writing what steps the Union has taken to comply herewith. Such notification shall be given within five (5) days, and again after sixty (60) days, from the date of the approval of this Agreement, or, in the event the Charging Party does not enter into this Agreement, after the receipt of advice that no review has been requested or that the General Counsel has sustained the Regional Director. Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in the above case.

[illegible] (Union)

By [illegible]
(Name and Title)

Date: [illegible]

Recommended By: [illegible]
(Date)

By [illegible]
Board Agent

[illegible]
(Charging Party)

By [illegible]
(Name and Title) (Date)

Date: Aug 1?, 196?

Approved: 8-19-6?

By [illegible]
Regional Director, [illegible]
National Labor Relations Board

JA-38

EXHIBIT [illegible]

NOTICE TO ALL MEMBERS

PURSUANT TO

A SETTLEMENT AGREEMENT APPROVED BY THE REGIONAL DIRECTOR
OF THE SEVENTH REGION OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

(AS AMENDED)

we hereby notify our members that:

WE WILL NOT by picketing or other like or related conduct induce or encourage any individual employed by Thomas S. Byrne, Inc., or any other person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal to work in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials or commodities or to perform any services where an object thereof is to force or require Thomas S. Byrne, Inc., or any other employer or person, to cease doing business with McDonald Brothers Sauce Products Co., Inc.

WE WILL NOT threaten, coerce or restrain Thomas S. Byrne, Inc., or any other person engaged in commerce or in an industry affecting commerce where an object thereof is to force or require said corporation to cease doing business with McDonald Brothers Sauce Products Co., Inc.

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 859
(Labor Organization)

Dated 8-23-17 By [signature] [signature]
(Title)

JA-39

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members have any question concerning this Notice or compliance with its provisions, they may communicate with the Board's Regional Office.

GC 3

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

In the Matter of: BROTHERHOOD, INTERNATIONAL UNION OF PAINTERS, ALLIED TRADES, AFL-CIO, LOCAL 559, AND J. K. DRESSING, BUSINESS AGENT

and

THE STABILE CONSTRUCTION COMPANY, INC.

CASE NO. 16-CC-215

SETTLEMENT AGREEMENT

The undersigned labor organization (herein called the Union) and the undersigned charging party (herein called the Charging Party), in settlement of the above matter and subject to the approval of the Regional Director for the National Labor Relations Board (herein called the Regional Director), HEREBY AGREE AS FOLLOWS:

POSTING OF NOTICE--Upon approval of this Agreement, the Union will post immediately in conspicuous places in and about its offices, including all places where notices to members are customarily posted, and maintain for a period of at least sixty (60) consecutive days from the date of posting, copies of the Notice to All Members attached hereto and made a part hereof. The Union will submit forthwith signed copies of said Notice to the Regional Director who will forward them to the employer whose employees are involved herein, for posting, the employer willing, in conspicuous places in and about the employer's plant where they shall be maintained for a period of at least sixty (60) consecutive days from the date of posting.

COMPLIANCE WITH NOTICE--The Union will comply with all the terms and provisions of said Notice.

Execution of this agreement by the Labor Organization is not to be construed as an admission of a violation of the Act.

NATIONAL LABOR RELATIONS BOARD

REFUSAL TO ISSUE COMPLAINT--In the event the Charging Party fails or refuses to become a party to this Agreement, then, if the Regional Director in his discretion believes it will effectuate the policies of the National Labor Relations Act, he shall decline to issue a Complaint herein and this Agreement shall be between the Union and the undersigned Regional Director. A review of such action may be obtained pursuant to Section 102.19 of the Rules and Regulations of the Board if a request for same is filed within ten (10) days thereof. This Agreement is contingent upon the General Counsel sustaining the Regional Director's action in the event of a review.

PERFORMANCE--Performance by the Union with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or, in the event the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Union of advice that no review has been requested or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE--The undersigned parties to this Agreement will each notify the Regional Director in writing what steps the Union has taken to comply herewith. Such notification shall be made within five (5) days, and again after sixty (60) days, from the date of the approval of this Agreement, or, in the event the Charging Party does not enter into this Agreement, after the receipt of advice that no review has been requested or that the General Counsel has sustained the Regional Director. Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in the above case.

BROTHERHOOD, INTERNATIONAL UNION OF PAINTERS, ALLIED TRADES, AFL-CIO, LOCAL 559, AND J.K. DRESSING, BUSINESS AGENT

(Union)

By: Kenneth Lindblom and Title, Attorney

Date: 1-11-67

Recommended: 1-11-67

Field Attorney

By: Business Agent

Betty M. Steele, Board Agent

THE STABILE CONSTRUCTION COMPANY, INC.

(Charging Party)

By: Joseph P. Stabile and Title, Secretary

Date:

Approved: 1-11-67

(Date)

Regional Director

National Labor Relations Board

JA-40

EXHIBIT 3

NOTICE TO ALL MEMBERS

PURSUANT TO

A SETTLEMENT AGREEMENT APPROVED BY THE REGIONAL DIRECTOR
OF THE SIXTEENTH REGION OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

(AS AMENDED)

we hereby notify our members that:

WE WILL NOT by picketing or other like or related conduct induce or encourage any individual employed by The Citadel Construction Company, Inc., Ben Loper Transit, or any other person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal to work in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials or commodities or to perform any services where an object thereof is to force or require The Citadel Construction Company, Inc., or any other employer or person, to cease doing business with McDonald Brothers Stone Products Co., Inc.

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 859, AND
J. M. BREEDING, BUSINESS AGENT

.....
(Labor Organization)

Dated ..... By .....
(Title)

JA-41

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office. Room 8A24, Federal Office Building, 819 Taylor Street, Fort Worth, Texas 76102 Telephone: 334-2921

NATIONAL LABOR RELATIONS BOARD
REGION 16
Room 8A24, Federal Office Building, 819 Taylor Street
Fort Worth, Texas 76102
Telephone 334-2921

March 18, 1969

Dee Brown Masonry, Inc.
Attn: Mr. Dee Brown
P. O. Box 28335
Dallas, Texas 75228

The Citadel Construction Company, Inc.
Attn: Mr. Stanley Schuster
P. O. Box 1138
San Marcos, Texas 78666

Thomas S. Byrne, Inc.
1307 Fort Worth National Bank
Building
Fort Worth, Texas 76102

Laborers International Union of
North America, Local 859, AFL-CIO
Attn: Mr. R. P. Vinall, Intl. Repr.
916 Burnet
Fort Worth, Texas

Re: Laborers' Local 859, and Dee Brown Masonry, Inc.; The Citadel Construction Company, Inc.; and Thomas Byrne, Inc.
Case Nos. 16-CC-327; 16-CC-315 and 16-CC-300

Gentlemen:

As a result of our investigation in Case No. 16-CC-327, it appears that the Settlement Agreements heretofore reached in Case Nos. 16-CC-300 and 16-CC-315 have been violated, and accordingly the regional approval of the said Settlement Agreements is being withdrawn. The said Settlement Agreements are hereby set aside.

Since the investigation of Case No. 16-CC-327 warrants the issuance of complaint, the three cases will be consolidated for purposes of trial and injunctive relief. If, however, there is any possibility of reaching settlement on these combined matters, please let us know as soon as possible. You are advised, however, that the Region will insist on a formal settlement which will provide for a Board Order and Consent Decree.

Please let us know if there is any question concerning this matter and if we may be of assistance in any way.

Sincerely,

Elmer Davis

Elmer Davis
Regional Director

cc: Mr. Marvin Menaker, Attorney
511 N. Akard, Suite 1101
Dallas, Texas 75201

GC-4

March 13, 1969

[redacted]

Re: [redacted]

Board Agent Assigned: [redacted]

Gentlemen:

The Charge in the above-captioned case has been amended, and a copy is enclosed for your information.

Thank you for your cooperation in this matter.

Sincerely yours,

[redacted]
Regional Director

Enclosure

REGISTERED RETURN
RECEIPT REQUESTED

cc: [redacted]

I certify that I served the Charge herein referred to on the above date by post paid registered mail on the addressee together with a transmittal letter of which this is a true copy.

[redacted]

Subscribed and sworn to before me this 20th day of March 1969.

[redacted]
Designated Agent

INSTR

(2

Rece

REGISTERED NO.

101297

CERTIFIED NO.

INSURED NO.

DATE DELIVERED

3/29/69

INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date, and address where delivered ☐ Deliver ONLY to addressee

(Additional charges required for these services)

RECEIPT MAR 24 1969

Received the numbered article described below.

REGISTERED NO. 101297

CERTIFIED NO.

INSURED NO.

DATE DELIVERED 3/29/69

1. SIGNATURE OR NAME OF ADDRESSEE (*Must always be filled in*)

2. SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

3. SHOW WHERE DELIVERED (*only if requested*)

e53—16—71648—10 GPO

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

National Labor Relations Board

Sixteenth Region

DOCKET NO. 16-CC-300
16-CC 315
16-CC 327

IN THE MATTER OF:

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 859,

Respondent

-and-

THOMAS S. BYRNE, INC., et al.

PLACE: Fort Worth, Texas.

DATE: April 22, 1969

D-11

PAGES: 1 - 73

C. S. A. REPORTING CORPORATION
Official Reporters
300 Seventh Street, S.W. Washington, D. C. 20024
393-2320

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Sixteenth Region

In the Matter of:	
LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 859	
Respondent	Case No. 16-CC-300
-and-	
THOMAS S. BYRNE, INC.	
Charging Party	
-and-	Case No. 16-CC-315
THE CITADEL CONSTRUCTION COMPANY, INC.	
Charging Party	
-and-	Case No. 16-CC-327
DEE BROWN MASONRY, INC.	
Charging Party	

Room 8A24,
819 Taylor Street,
Fort Worth, Texas

Tuesday, April 22, 1969.

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock a.m.

BEFORE:

A. BRUCE HUNT, Esq., Trial Examiner.

APPEARANCES:

DAVID L. EVANS, Esq.,	Counsel for the General Counsel, National Labor Relations Board, 819 Taylor, Fort Worth, Texas, 76102.
MARVIN MENAKER, Esq.,	Bader, Wilson, Menaker and Cox, 211 N. Ervay Street, Suite 520, Dallas, Texas, appearing on behalf of the Respondent.
WILLIAM L. KELLER, Esq.,	Clark, West, Keller, Sanders and Ginsberg, 2424 First National Bank Building, Dallas, Texas, 75202, appearing on behalf of the Charging Party Dee Brown Masonry, Inc.
JOSEPH P. PARKER, Esq.,	Sear and Parker, 1901 Commerce Building, Fort Worth, Texas, 76102, appearing on behalf of the Charging Party Thomas S. Byrne, Inc., and Citadel Construction Co., Inc.

- - -

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Lawrence Drake	33	39	-	-
G. G. Adams	43	46	48-51	50
John Wallace	52	56	-	-
Frank Thomason	59	64	66-70	-

E X H I B I T S

NUMBER	FOR IDENT.	IN EVID.
General Counsel's:		
1(e) - 1(p)	6	6
2, 3 & 4	28	28
1(a) - 1(d)	72	72
Trial Examiner's:		
1	28	28
2, 3 & 4	29	29

P R O C E E D I N G S

TRIAL EXAMINER HUNT: The hearing will come to order.

This is a formal hearing before the National Labor Relations Board in the matter of Laborers International Union of North America, Local 859, AFL-CIO, cases 16-CC-300, 315 and 327.

The Trial Examiner conducting the hearing is A. Bruce Hunt.

I will ask counsel to please state their appearances for the record.

For the General Counsel.

MR. EVANS: For the General Counsel, David L. Evans, 819 Taylor, Fort Worth, Texas, 76102.

TRIAL EXAMINER: For the Charging Parties.

MR. KELLER: For Dee Brown Masonry, Inc., William L. Keller, firm, Clark, West, Keller, Sanders and Ginsberg, 2424 First National Bank Building, Dallas, Texas, 75202.

MR. PARKER: For Thomas S. Byrne, Inc., and Citadel Construction Co., Inc., Joseph P. Parker, Sear and Parker, 1901 Commerce Building, Fort Worth, Texas, 76102.

TRIAL EXAMINER: For the respondent union.

MR. MENAKER: Marvin Menaker, Bader, Wilson, Menaker and Cox, 211 North Ervay Street, Suite 520, Dallas, Texas.

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

Proceed, Mr. Evans.

MR. EVANS: At this time General Counsel offers into evidence the formal exhibits 1(a) through 1(p), exhibit (p) is an index and description of the formal documents.

I handed the duplicate exhibits to Mr. Menaker.

MR. MENAKER: Respondent objects to the admission of the documents that are designated as 1(a), 1(b), 1(c) and 1(d).

I would be glad to explain my objection if you wish to hear it, Mr. Trial Examiner.

TRIAL EXAMINER: Give me a moment, please, to see which documents they are.

That is 1(a), (b), (c) and (d).

MR. MENAKER: Yes, sir.

TRIAL EXAMINER: State your objection.

MR. MENAKER: Mr. Trial Examiner, those documents refer to the charges in cases number 16-CC-300 and 315.

It is the position of the respondent that they are not properly before you and that you should not hear any testimony concerning the alleged unfair labor practice committed against Byrne and Citadel for the reason that both of those matters were the subject of a settlement agreement freely entered into between the National Labor Relations Board and this respondent union, whereby the union did not admit liability, but took

certain affirmative action in order to avoid the expense and time of a trial.

This respondent union has in all respects complied with that settlement order, and, having done so, the Board is not entitled to reopen those matters because of other things that have happened and subject us to a double penalty.

Indeed, as soon as we get beyond this preliminary stage we are going to make a motion to strike as to those two case numbers.

TRIAL EXAMINER: It is too early in the hearing for me to rule upon any matter in connection with a settlement agreement. I will have to hear more facts before I can make an intelligent decision.

For the time being I will receive in evidence all of General Counsel's exhibits 1(a) through 1(p), except for the first four documents. I will withhold ruling on those.

(General Counsel's Exhibits 1(e) through 1(p) were marked for identification and received in evidence.)

TRIAL EXAMINER: Are there any matters or motions before we begin the taking of testimony?

MR. EVANS: Mr. Trial Examiner, I believe I noted an inadvertent error in the complaint. Paragraph 18 alleges the settlement agreements which Mr. Menaker was referring to were set aside on March 25, 1969, actually it was the date March

18, 1969.

I move to amend paragraph 18 to change the date from March 25, 1969 to March 18, 1969.

TRIAL EXAMINER: Is there any objection?

MR. MENAKER: I do not have any objection to that.

TRIAL EXAMINER: I grant the motion.

Is there anything else?

MR. EVANS: I believe we have some commerce stipulations which will clear up the pleading.

TRIAL EXAMINER: Very well.

MR. EVANS: As to paragraph 4, General Counsel proposes the stipulation -- well, rather than read them all in I will ask Mr. Menaker if he will join me in a stipulation upon the information General Counsel represents to have in his files the commerce data listed therein is correct.

MR. MENAKER: May we go off the record.

TRIAL EXAMINER: Did you say you want to go off the record?

MR. MENAKER: Yes, sir.

TRIAL EXAMINER: You may.

Off the record..

(Discussion off the record.)

TRIAL EXAMINER: On the record.

MR. EVANS: Mr. Trial Examiner, contained in our files are affidavits from principals of the corporations enumerated

in paragraph 4 stating that the commerce data as alleged in paragraph 4 is correct.

I propose a stipulation that the commerce data as listed in paragraph 4 is correct.

MR. MENAKER: So stipulated.

MR. EVANS: I further propose the stipulation alleged in paragraph 5, that Byrne, Citadel, Brown and McDonald are now, and have been at all times material herein, persons engaged in commerce within the meaning of Section 2(6) and 8(b)(4) of the Act.

MR. MENAKER: We will so stipulate based upon your representation that that is a fact.

MR. EVANS: That is our representation.

MR. MENAKER: So stipulated.

Mr. Trial Examiner, at this time Respondent would move that the opening paragraph of the complaint and paragraphs 10, 11, 12, 13 and those portions of paragraph 19 and 20 that refer to cases numbers 16-CC-300 and 16-CC-315 be stricken for the reason that these two matters are matters that were settled by a compromise settlement agreement freely entered into by the National Labor Relations Board and this respondent union, under which we undertook to perform certain acts we would not have undertaken and under which we did not acknowledge we had committed any unfair labor practice.

If the Trial Examiner will refer to the complaint, in paragraph 14 he will note the Board acknowledges that settlement agreements were entered into.

It is our contention, in the absence of a violation of that agreement, and I do not believe it is seriously contended by the Board that we have violated as to Byrne or Citadel, the absence of any such intention on our part, it is not properly before you.

We ask that you exclude all testimony relating to those matters from this hearing.

TRIAL EXAMINER: I will have to take a recess in a few moments and study the pleadings.

During that recess I hope counsel will bring me some decisions of the Board respecting the matter of when a settlement agreement may be set aside and matters covered by settlement agreement may be litigated.

I think you probably have these cases in your file. If you can present them to me during the recess, fine.

I have one question. From a quick glance at the complaint it is alleged in paragraph 8 that the Board certified the respondent union as the representative of employees of McDonald, but that the Board did not issue an order directing McDonald to bargain.

The answer has missed the allegation.

I can visualize circumstances under which it is relevant

that the Board certify a labor organization in a case of this sort, but I do not see the relevancy of an allegation that the Board did not order McDonald to bargain.

Will you gentlemen tell me where that is relevant?

MR. EVANS: Except to the extent that the testimony will show there is presently a labor dispute outstanding between the parties. It has not been settled by the Board and the private agreement of the parties.

TRIAL EXAMINER: A labor dispute between McDonald and the respondent?

MR. EVANS: Yes, sir.

TRIAL EXAMINER: I do not know that that helps me. There are various types of labor disputes. My question was a simple one; what is the relevancy of an allegation the Board did not order McDonald to bargain.

Does this go to any provision of the statute?

MR. EVANS: No, sir. It is a formal pleading that sometimes gets into the complaint. I cannot answer that question at this time, but I would like to be allowed to come back and answer that question later in the hearing, if I may.

TRIAL EXAMINER: Very well.

Do you have any comment?

MR. MENAKER: There is no relevance.

We have not been charged with a refusal to bargain. Therefore, it certainly does not go into any alleged unfair

labor practice the respondent committed.

In any event, we do not see where it is relevant as far as we are concerned.

TRIAL EXAMINER: Would it be better to have opening statements of counsel now or somewhat later after the recess I mentioned a moment ago.

MR. MENAKER: Mr. Trial Examiner, I would recommend an opening statement be made at this time, because, let me be very candid with you, how you rule on the motion that is before you not only affects this hearing, but it affects what is going to happen in the relationship between the respondent and the party with whom we have a primary dispute, tomorrow morning. And, perhaps the relationship that it may have on the Byrne and Citadel Construction Company.

So, I think we should have a rather full statement before you rule so you may consider it in making your decision.

TRIAL EXAMINER: Suppose during the recess you gentlemen prepare your opening remarks if you have not already done so, first I will study the complaint before we have those remarks.

MR. EVANS: I can give my opening statement now, if the Trial Examiner wants to hear an opening statement. I have one ready.

TRIAL EXAMINER: I think I would rather read the complaint first.

MR. EVANS: Yes, sir.

TRIAL EXAMINER: And have you gentlemen hand me some cases of the Board relating to the setting aside of a settlement agreement.

We will have a ten minute recess.

(A short recess was taken.)

TRIAL EXAMINER: On the record.

The hearing was extended over the ten minutes because of authorities counsel has referred me to.

First, I would like to ask the date the Board certified the respondent as representative of McDonald's employees.

Secondly, I would inquire if the certification is reported.

MR. EVANS: In our files we have two different rep resentation cases. There have been two elections, both of which the union won.

One was held in 1967 I believe. It was an RC election. Then, recently, April 11, 1969, just a few weeks ago, there was another election held. It was an RM election in which the union also won.

The certification issued within one or two days. I am not aware of any objections having been filed.

MR. MENAKER: The most recent certification is dated yesterday, April 21, 1969.

TRIAL EXAMINER: Do you have both certifications to which Mr. Evans referred?

MR. MENAKER: I do not believe I have the earlier certification.

MR. EVANS: I can obtain one.

TRIAL EXAMINER: Very well.

MR. EVANS: Do you want me to go get it now?

TRIAL EXAMINER: Yes, please.

Were these consent elections?

MR. EVANS: Mr. Marks will get that for me.

MR. MENAKER: Our understanding, Mr. Examiner, is the first was a Board-ordered election, and the second was a consent.

TRIAL EXAMINER: We will find out shortly when the employee of the Regional Office returns.

I will read from the certification of representative handed to me a moment ago, by counsel for the respondent.

The case is numbered 16-RM-389 involving the respondent here and McDonald Brothers Cast Stone Company. The date of the certification is April 21, 1969.

The unit consists of "All production and maintenance employees, including patchers and truck drivers of the employer at its Fort Worth, Texas plant."

And, excluded were "Office clerical employees, guards, chief engineer, foremen, leadmen and all supervisors as defined in the Act."

While we are awaiting material on the earlier certificati

I think we might utilize the time by my referring to certain cases and materials given to me during the recess by counsel.

One case is Point Pontiac, 174 NLRB 191.

Another is Pioneer Natural Gas Company, 158 NLRB 1067.

Another is Lock Joint Pipe Company, 141 NLRB 943.

Another is Northern California District Council of Hod Carriers and Common Laborers of America, et al, 154 NLRB 1384.

The final one is an old case in years, Wallace Corporation, 323 U. S. 248.

I have also read the settlement agreements in cases number 16-CC-300 and 315, as well as a letter of March 18, 1969 from the Regional Director to various parties in those two cases, as well as in 16-CC-327, in which the Regional Director expressed his decision to set aside the settlement agreement and to issue a consolidated complaint.

Now, which of you gentlemen would like to speak first?

MR. EVANS: Mr. Trial Examiner, this case involves a course of conduct by the respondent union of going to a jobsite where at McDonald Cast Stone Products are being utilized or consumed by various contractors.

This is not a common situs case or threat of common situs picketing, for at no time during the events involved herein were any McDonald men on the jobs involved herein, in none of the three cases. This factor has made no differ-

ence to the union. It has served notice to all that it will picket whenever and wherever the opportunity presents itself and regardless of whether the fact that no McDonald men are on the job to which McDonald would have a right to appeal.

The chronology is as follows: On or about August 1, 1968 Respondent has had a primary labor dispute with McDonald. They have picketed McDonald's Fort Worth plants, and no issue is involved in that picketing of McDonald's where the stone is actually fabricated.

However, starting on August 6 they began a course of conduct, the course of conduct in question here.

On August 6 Mr. James Patterson received a letter from union representative Lawrence O'Neil stating the union had a labor dispute with McDonald.

Upon receiving this letter Mr. Patterson called Mr. John Wallace and told him that no McDonald men or materials were there or were to thereafter come on the job site.

Mr. Wallace replied that that made no difference, that the union would picket any way if McDonald stone came on the job.

Also, on the same day, union representative Lawrence O'Neil informed Mr. G. G. Adams, who is Mr. Patterson's job superintendent, that there would be picketing if McDonal stone were brought on the jobsite, again, regardless of who delivered it.

That basically is the story of the case in 16-CC-300 involving Thomas S. Byrne Construction at the Star Telegram Building, a block away from these premises. That was in August 1968.

In December 1968 the Citadel Construction Company was engaged as a general contractor for a building at North Texas State University, in Denton.

The Citadel's contract provided for the installation of stone. Citadel had agreed to purchase stone from McDonald.

On December 27 an independent contract hauler by the name of Ben Loper, Inc., delivered stone paneling to the job-site at Denton, and the union promptly erected a picket causing a work stoppage of some 40 employees of Citadel and other employers.

That essentially is the case involved in CC-315.

If I may back track a minute, I did not mention that there was picketing on August 7, 1968 at the Fort Worth Star Telegram. This picketing caused work stoppages of some 60 employees, secondary employees, employees of secondary employers.

On March 12, 1969, Mr. Dee Brown,President of Dee Brown Masonry, Inc., informed union representative Bud Vinall, that he was going to purchase McDonald stone and have it delivered by an independent hauler, and asked Vinall if the union was going to picket. To this Vinall replied, "Yes, he would

picket whenever the opportunity presented itself."

From a period of March 3 to March 13 the union has maintained an agent upon the premises of the Dallas Telephone Toll Building construction site where Dee Brown is employed as a masonry subcontractor and where he is planning to use the McDonald stone.

On March 13, the date after the conversation between Dee Brown and Vinall, the agent of the union informed Lawrence Drake, Brown's masonry foreman that the union would picket if any McDonald stone arrived at that jobsite; of course, by this time the union had notice that an independent hauler would be bringing the stone to the job. There would not be any McDonald men or equipment on the job.

On the basis of these threats the Regional Director set aside the settlement agreements which had been reached in cases CC-300 and 315 which I have outlined previously.

This complaint, accordingly, was issued thereafter.

On March 31, 1969 there was a hearing at the Federal District Court in Dallas, Texas under section 10(1) of the Act, where General Counsel as petitioner requested a 10(1) injunction. The court has taken the case under advisement and has issued a temporary restraining order and extended it indefinitely until the court made its decision in that case.

That brings us up to date.

TRIAL EXAMINER: I believe when you were speaking someone brought to you the earlier certification.

MR. EVANS: Yes, sir.

TRIAL EXAMINER: Mr. Menaker, I returned to you the certification of yesterday, and I ask you if the unit in the certification of yesterday coincides with the unit in the earlier certification.

MR. MENAKER: Yes, sir, they are identical.

TRIAL EXAMINER: The earlier certification is also by the Regional Director, issued on November 6, 1967 in case number 16-RC-4728.

Neither of these certifications is reported insofar as I can see.

Now, Mr. Evans, as of the August 1968 and later, what was the relationship between McDonald and the union?

The union says in its answer that at one point at least, McDonald was bargaining.

MR. EVANS: Yes, sir.

The Regional Office has not been involved in the merits of the dispute between McDonald. I assume the union and the company had not agreed on a contract. That is the reason for the picketing involved herein.

The union is either picketing for a better contract or an attempt to get the company to bargain.

TRIAL EXAMINER: Do you have any information concerning

whether bargaining was in progress in August 1968 and thereafter?

MR. EVANS: I think the union could answer that question better than I could.

TRIAL EXAMINER: I intend to ask Mr. Menaker.

MR. EVANS: It is my understanding that there haven't been any negotiating sessions since July 1968.

TRIAL EXAMINER: When was the RM petition filed that resulted in yesterday's certification?

MR. EVANS: February 24, 1969.

TRIAL EXAMINER: Let us turn to Mr. Menaker for his opening statement.

MR. MENAKER: Mr. Trial Examiner, my statement will be simple.

We have been engaged in a primary labor dispute with McDonald Brothers Cast Stone Company since on or about August 5, 1968. This has been a continuous economic strike since that time, and began after the parties were unable to reach a contract.

There is a bargaining session set now for tomorrow.

In furtherance of our economic self help efforts we have engaged and are now engaging in an economic strike.

It is our contention we have a perfect right to picket McDonald stone both at its plant through the use of ambulatory pickets following the trucks of McDonald Stone.

We say, further, we have a right to picket an ally if that ally happens to be an independent hauler, there is a financial relationship, we may picket that person.

We say, further, that we have a right to picket the product of McDonald Stone when it is readily identifiable and not intermixed, just as we would have the right to picket an empty plant.

Those are our primary contentions.

Counsel, when he states we have picketed jobsites is incorrect. We have always picketed the truck carrying the product under the Moore Drydock Standards to the best of our ability. When there is no truck at the jobsite, that picket leaves.

TRIAL EXAMINER: Excuse me, this may be a truck owned by McDonald, transporting McDonald's product to a jobsite or it may be a truck of an independent carrier that transports McDonald's product to a job site; is that what you said?

MR. MENAKER: We are going even further. If there is another contractor and based upon a financial arrangement McDonald gets a change in the price based upon picking it up f.o.b. at the McDonald plants, then we say that makes him an ally.

It so happens, Mr. Trial Examiner, that in the Dee Brown case there has been no picketing of any kind. There has been a telephone conversation which we readily admit to

in which Mr. Brown says he is going to do what he has a legal right to; namely, to try to get his job going. We say we are going to do what we have a legal right to do; namely, picket McDonald. That is a fact.

The only picketing that has occurred has been in connection with the other two matters of which we say are not properly before you and which were settled.

TRIAL EXAMINER: I understand you to say that a bargaining session with McDonald is scheduled for tomorrow?

MR. MENAKER: That is correct, sir.

TRIAL EXAMINER: Perhaps our first issue goes to paragraph 15 of the complaint, the alleged threat to picket construction site of Dee Brown.

I understand counsel for the respondent to say insofar as there was a threat it was over the telephone and may not have been a threat to picket the entire construction site.

MR. MENAKER: It is our position any picketing would have taken place only upon the delivery and during the time McDonald stone was on the premises.

TRIAL EXAMINER: Consistent with Moore Drydock principle.

MR. MENAKER: Yes, sir.

TRIAL EXAMINER: If I understand correctly it seems to me the first problem is to hear the evidence relating to the alleged violation involving premises of Dee Brown.

MR. EVANS: Yes, sir. I would agree with that. We are

prepared to go forward at this time with the Dee Brown case.

TRIAL EXAMINER: I will now call a five minute recess.

(A short recess was taken.)

TRIAL EXAMINER: On the record.

Mr. Evans wants to respond to the remarks made by Mr. Menaker.

I would inquire now if Mr. Keller or Mr. Parker have any comments to make.

MR. PARKER: I would like to make an observation here that has not been called to the Trial Examiner's attention. In 16-RC-315, in 16-CC-315 we did not enter into that settlement agreement, at that time. We took the position the union had violated the settlement agreement. The settlement agreement also restricted them from engaging in such activity as had been engaged in against Thomas S. Byrne, Inc.

They had agreed that they would not engage in this type of activity. The settlement agreements are in the record. This is the reason the Charging Party, Citadel, at that time, did not enter into that settlement agreement taking the same position then that the General Counsel has taken now, that there had been a violation of the previous settlement agreement.

There are some side comments and assurances by the Regional Director and the union. I will have to look to the record as to why the Region would not listen to our

position.

I would want the Trial Examiner to be aware that the Charging Party, Citadel, took that position at that time and continues to take that position, sir.

TRIAL EXAMINER: Very well, sir.

Mr. Keller.

MR. KELLER: I think the General Counsel has stated the basis for the charge and the action in the Federal Court in Dallas.

The facts are as indicated, simply, Dee Brown Masonry Contractor so advised the union there would not be McDonald trucks at the jobsite and were told by Mr. Vinall, the union intended to picket the product at the jobsite and there was an individual who seemed to be a picketer-in-waiting who was there for a matter of days waiting for the arrival of the stone. He has in his possession a picket sign. He indicated when questioned by one of Mr. Brown's employees, the job superintendent, that he in fact intended to picket when the stone was delivered.

I think that pretty well states it.

TRIAL EXAMINER: You go ahead, Mr. Evans.

MR. EVANS: Mr. Trial Examiner, I have a very brief reply to two points raised by Mr. Menaker.

He stated that he has a right to picket the haulers involved herein, apparently, based on the Royal Typewriter

economic ally line of cases.

I would like to point out to the court that Royal Typewriter itself distinguishes the facts before it from a case where the secondary employer, in an effort to complete his contractual obligations, went out and hired the independent contractor. In such as case the Second Circuit indicated that the economic ally relationship would not be established.

This was later solidified in a holding in NLRB versus Enterprises Associated Plumbers, 285 at 642 which says where the independent contractor is not secured by the primary, but is secured by a secondary in an effort to complete his, the secondary's contractual obligations, the independent contractor so hired is not an ally of the primary employer whom the union otherwise would have the right to picket.

Now, the reason for this rule is very simple. If an employer is doing business with another employer who has a labor dispute on his hands, and there is a transfer of materials between the two, there is only two things he can do, Mr. Trial Examiner; one, go get a hauler and get the materials himself and have it brought to the jobsite.

Secondly, cease doing business with the primary employer which is the specific evil which 8(b)4(b) was designed to prevent.

Mr. Menaker next said the picketing involved herein was

a product picketing, apparently under the Tree Fruits line of cases. I would point out to the Trial Examiner here that the Tree Fruits decision went to great lengths to show there were no work stoppages involved.

I would also point out to the Trial Examiner that in Tree Fruits the Supreme Court talked about Safeway being a point of distribution; but, of course, in this case, nothing is being distributed from the construction sites involved herein.

That is all I have.

TRIAL EXAMINER: You are arguing the points of law made by Mr. Menaker.

MR. ADAMS: Yes, sir.

TRIAL EXAMINER: I got the impression from Mr. Menaker it would be appropriate for me to ask whether you gentlemen can stipulate the facts concerning Dee Brown.

Now, I ask that question for two reasons; one, you have heard the testimony on this subject before the District Court Judge in Dallas.

If you can stipulate to the facts, then, depending upon my ruling, you may stipulate additional facts concerning Thomas S. Byrne and Citadel Construction Company.

I am prompted to ask this question, because I thought perhaps Mr. Menaker's position is largely a legal one, one which he would want to brief. If you can resolve any factual

issues by stipulations, then you will have adequate time in which to brief the legal point, and I will have the time to study them.

MR. MENAKER: Mr. Examiner, I have with me an official transcript of the proceedings before the Honorable Sarah T. Hughes. This was the sworn testimony and stipulation received by the court as the basis for her ultimate decision in this matter.

I am prepared to tender this to you and stipulate that if called to trial everybody would testify as to the same and the respondent is prepared to stipulate to everything we stipulated to herein.

TRIAL EXAMINER: Are there disputes in the facts?

MR. MENAKER: No, sir, I did not put a witness on. There are no credibility resolutions necessary.

MR. EVANS: Now as to the testimony of Mr. Dee Brown, I believe I would like to have a moment with counsel on that, but I do not think there would be anything to add on Mr. Dee Brown.

As Mr. Menaker will remember, I was cut off from my testimony when I called Lawrence Drake to the witness stand, and, I did not get an oral conversation between Mr. Drake and an agent of the union.

TRIAL EXAMINER: You and Mr. Menaker and other counsel discuss this subject privately and see what you can stipulate.

MR. EVANS: We will try.

TRIAL EXAMINER: I am not asking any of you to yield in any respect. I am asking you to talk.

Take ten minutes and talk.

(A short recess was taken.)

TRIAL EXAMINER: On the record.

MR. MENAKER: Mr. Trial Examiner, respondent proposes a stipulation as follows: We propose to stipulate the transcript in the record in civil action number 3-3072-B, styled National Labor Relations Board versus Laborers' International union of North America, Local 859, AFL-CIO, is a true and correct transcript of the proceedings that were taken in a hearing before the Honorable Sarah T. Hughes, Federal District Judge for the Northern District of Texas, under a petition filed by the National Labor Relations Board seeking a 10(ℓ) injunction.

We would stipulate that any stipulations contained therein would be a stipulation that would also apply to this proceeding, and, further, that all of the testimony contained therein is true and correct and if those witnesses were called to testify in this proceeding, they would testify identically.

It may be used for the -- it may be used by the Trial Examiner for any purpose.

TRIAL EXAMINER: Very well.

I think at this point we should mark some exhibits.

Suppose I mark General Counsel's exhibit number 2, the settlement agreement in case number 16-CC-300.

As General Counsel's exhibit number 3 the settlement agreement in case number 16-CC-315.

And, as General Counsel's exhibit number 4 the Regional Director's letter of March 18, 1969 which I earlier mentioned.

Is this agreeable?

MR. MENAKER: Yes, sir.

I ask the notice be included as a part of the exhibit.

TRIAL EXAMINER: Yes.

MR. MENAKER: I so stipulate.

TRIAL EXAMINER: Is it agreeable to mark as General Counsel's exhibit number 5 a copy of the transcript before Judge Hughes?

MR. MENAKER: No objection.

MR. EVANS: No objection.

TRIAL EXAMINER:I will simplify it and mark the transcript as Trial Examiner's exhibit number 1.

(The documents above-referred to were marked General Counsel's exhibits 2, 3 and 4 for identification and received in evidence.)

TRIAL EXAMINER: I receive these documents in evidence.

(The document above-referred to was marked as Trial Examiner's Exhibit No. 1 for identification and received in evidence.)

TRIAL EXAMINER: Now, Mr. reporter, mark as Trial

Examiner's exhibit number 2 a letter from J. M. Breeding to Thomas S. Byrne, Inc.

MR. EVANS: Mr. Trial Examiner, I would offer as Trial Examiner's exhibit number 3 a telegram from James N. Patterson, Junior, President of Thomas S. Byrne, Inc., to Mr. J. M. Breeding.

Trial Examiner's exhibit number 4 will be a photograph of a picket, a man carrying a picket sign that is before a truck loaded with McDonald stone.

Do you gentlemen agree there has been no picketing at any jobsite on which Dee Brown was working?

MR. EVANS: That is General Counsel's understanding there has not been.

No, sir, there has not been any picketing of any Dee Brown premises during this labor dispute, beginning about August 1, 1968.

MR. MENAKER: Dee Brown Construction Company has not been picketed.

TRIAL EXAMINER: Trial Examiner's exhibits 2, 3 and 4 will be received in evidence.

(The documents above-referred to were marked Trial Examiner's Exhibits No. 2, 3 & 4 for identification and received in evidence.)

TRIAL EXAMINER: This material has been coming in rather rapidly. I have been trying to go through the transcript.

Is it correct to say, according to the testimony, there was a statement made by Mr. Brown in a telephone conversation which he initiated; that the stone would be picketed, but no picketing on the premises of which Brown's employees were working.

MR. EVANS: We would add to that; yes, sir, but we would like to add although there was no picketing following this conversation, as a matter of fact there was no McDonald stone coming on the job until after the District Court issued a temporary restraining order.

TRIAL EXAMINER: You don't mean that some came on after or do you mean that some McDonald stone came on after the restraining order was issued?

MR. EVANS: Yes, sir, that is right.

TRIAL EXAMINER: But it was not transported by McDonald employees if I understand it correctly?

MR. EVANS: No, sir.

That was covered in the cross-examination of Mr. Brown by Mr. Menaker.

TRIAL EXAMINER: Aside from legal issues, what else remains?

MR. EVANS: We have a conversation between a man named Anthony Mullens who General Counsel has alleged as an agent and Lawrence Drake, Dee Brown's foreman at that jobsite on the day following the conversation between Vinal and Brown.

We have two points to cover, first, Mr. Menaker, that is, Respondent has denied the allegation of paragraph 6 of the complaint which alleges Mullens as an agent.

I would ask Mr. Menaker if he would, would he be willing to join in a statement, Mr. Vinal, Mr. Wallace, Mr. O'Neil and for these purposes, Mr. Mullens, are agents of the union within 2(11) and 2(13) of the Act.

MR. MENAKER: Mr. Evans, Mr. Wallace is an agent.

Mr. Vinal is an agent.

Mr. O'Neil is an agent.

Mr. Mullens is not an agent.

TRIAL EXAMINER: Does Mr. Mullens occupy a position in the union? Did he occupy any position on any critical date

MR. MENAKER: He was a striking employee of McDonald, was and is.

TRIAL EXAMINER: An employee of McDonald.

MR. MENAKER: Yes.

TRIAL EXAMINER: Was he a member of the union?

MR. MENAKER: Yes, sir.

MR. EVANS: Will you stipulate that he was the picket captain at the Citadel Construction Company jobsite?

MR. MENAKER: Yes, we will stipulate that.

MR. EVANS: Our position is as shown in the record before the District Court, the union has maintained Mr. Mullens at or about the premises of Mr. Dee Brown jobsite in Dallas. He

has been equipped with at least one picket sign.

Mr. Menaker, during District Court contended there were two. We do not know. At least there were picket signs for the purpose of picketing on behalf of the union should any McDonald stone arrive at the jobsite.

Mr. Mullens, who informed the agent of Mr. Dee Brown, referring to Mr. Drake that he was going to and on behalf of the union --

TRIAL EXAMINER: Is this in the testimony before the District Court?

MR. EVANS: No, sir, I am just stating our position. We didn't get into this conversation between Mr. Mullens and Mr. Brown.

I am just stating our purposes for alleging him as an agent of respondent.

TRIAL EXAMINER: Is there any evidence that Mullens engaged in any conduct?

MR. EVANS: Yes, sir.

It is our contention he threatened Dee Brown.

TRIAL EXAMINER: Where is this evidence? Have you put it in?

MR. EVANS: No, sir, I didn't get it in in the District Court.

TRIAL EXAMINER: Are you attempting to get it in here?

MR. EVANS: Yes, sir.

TRIAL EXAMINER: Do you all have an understanding about this?

MR. EVANS: I thought we did.

MR. MENAKER: If he will state what stipulations he wishes about what Mr. Mullens said maybe we can stipulate.

I do not agree he was or is an agent.

You, Mr. Trial Examiner, in the exercise of your judicial functions will make that determination if you deem it appropriate.

TRIAL EXAMINER: Make the proposed stipulation off the record concerning remarks allegedly made by Mullens.

Off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

There is no stipulation.

MR. MENAKER: For the record, on the previous stipulation I did not hear counsel's agreement.

MR. EVANS: We do agree with the stipulation.

I will now call Mr. Drake.

Whereupon,

LAWRENCE DRAKE,

was called as a witness, by and on behalf of Counsel for the General Counsel, and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Evans.) State your name and address.
A Lawrence Drake. I live at 2428 Inadale, Dallas, Texas.
Q Mr. Drake, by whom are you employed?
A Dee Brown Masonry.
Q What is your position with Dee Brown?
A Masonry foreman.
Q Do you know Mr. Anthony Mullens?
A I do not know the name Anthony.
Q Do you know him by another name?
A Yes.
Q What name is that?
A We call him Preacher Mullens.
Q How long have you known him?
A Approximately a year.
Q Have you observed him at or about the premises of the Dallas Telephone Toll Building construction site in Dallas, Texas?
A Yes.
Q Is that the construction site where you were engaged in your employment as a masonry foreman?
A Yes.
Q When did you first observe Mr. Mullens at that construction site?
A March 3.
TRIAL EXAMINER: This year?

THE WITNESS: Yes, sir.

Q (By Mr. Evans.) Where was Mr. Mullens situated?

A Across Brian Street.

Q Is this across the street from the construction site?

A Yes, sir.

Q Did you speak to Mr. Mullens?

A Yes, sir.

Q What was said?

A We just passed the time of day on the third of March. He told me that he thought he thought we had a little stone coming in.

Q Did you reply to that?

A Well, I told him I didn't know.

Q Did you observe Mr. Mullens at or about those premises at any other time?

A Almost every day.

Q For how long?

A The last time I talked to him as I remember was March 13.

Q You did speak to him on March 13?

A Yes.

Q Will you tell the Trial Examiner what was said on March 13,1969.

A I asked him if he was going to picket the job.

Q What did he say?

A He said, "No."

MR. MENAKER: Objection.

TRIAL EXAMINER: Do you object now that you have heard the answer?

MR. MENAKER: No, not now.

Q (By Mr. Evans.) I will ask him if anything was said.

MR. MENAKER: Objection to hearsay.

TRIAL EXAMINER: I will overrule it.

What did Mullens say to you, if anything?

THE WITNESS: He said he would picket the stone truck or the stone if it arrived on the job.

Q (By Mr. Evans.) Did you observe any objects which would identify the union in any way at those premises that day?

A Yes.

Q What did you observe?

A A picket sign.

Q What did the picket sign say?

A It --

Q I will withdraw that question.

Where was this picket sign?

A In the back seat of the second seat of his station wagon.

Q Mullen's station wagon?

A I suppose it is his. He was driving it.

Q Tell the Trial Examiner what that picket sign said.

TRIAL EXAMINER: Is this covered in the testimony about a

sign before Jugh Hughes?

MR. EVANS: This particular question would be but we are leap frogging here. Some of these things are and some are not.

TRIAL EXAMINER: Do you recall the exact wording of the sign?

THE WITNESS: Not exact, but basically --

Q (By Mr. Evans.) Was it the same or any different from the picket sign picture in Trial Examiner's exhibit number 4 which I just handed you?

A It is different from this.

Q Can you tell me in what way it is different?

A It does not have the "Don't buy products of McDonald" on it for one thing, otherwise, it is basically the same.

TRIAL EXAMINER I will show you the transcript of the District Court, page 21, lines 13 through 17 and ask you to read those lines.

THE WITNESS: Yes.

TRIAL EXAMINER: Read it to yourself.

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Tell me whether the sign you saw at or in Mullens -- that Mullens had was like the sign described in the testimony?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: What?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: The witness testified the signs Mullens had were worded like the sign described on page 21.

Q (By Mr. Evans.) Did Mullens identify himself to you as an employee of McDonald Stone?

A NOt in so many words, no.

Which time are you talking about?

Q On March 13?

A No.

Q Did he before then?

A I had seen him on jobs before that, yes, delivering stone for McDonald.

Q Who was in charge of the Dee Brown Masonry job at that time?

A The first time I saw Mullens?

Q Excuse me. On March 13 who was in charge of the job at that time?

A I was.

Q You were for Dee Brown?

A Yes.

Q How many men did you have working under you?

A On March 13?

Q Yes, sir?

A About five or six. I do not remember exactly.

Q How many of these were rank and file employees and how

many were foremen?

A One was a foreman.

Q The others were rank and file laborers? I use that term loosely; were they brick layers?

A They were iron workers and laborers.

Q For what craft?

A Iron Workers.

Q Iron Workers?

A Yes.

Q It was an iron worker foreman?

A Yes.

Q Mr. Drake, just exactly what did Mr. Mullens say to you on the thirteenth?

MR. MENAKER: Objection, hearsay.

TRIAL EXAMINER: Haven't we covered this once?

MR. EVANS: I have asked you that question, Mr. Drake?

THE WITNESS: Yes.

MR. EVANS: I will withdraw the question.

No further questions.

I pass the witness.

CROSS-EXAMINATION

Q (By Mr. Menaker) Mr. Drake, as I understand it, this gentleman you identified as MR. Mullens would park across the street from the job; is that right?

A Yes.

Q You would walk over there and chat with him, is that right?

A Yes.

Q Did you do this about every day?

A Almost every day.

Q Go over and sit in the car?

A No, not all the time.

Q Lean on the window?

A Yes.

Q He never patrolled up and down at the jobsite, did he?

A He had to move frequently because it is two hour parking and he had to move, keep his car moving.

Q He was not walking up and down the jobsite with the sign?

A No, with the sign, no.

Q The sign was laying flat in his station wagon, is that right?

A Yes.

Q Every conversation the two of you had, you initiated; that is, you went over to him?

A Yes, that is correct.

Q Had you been told to go over there and engage in conversation about the stone?

A One time.

Q By whom, please?

A Dee Brown.

Q Was the substance of that request to get him to talk about it and see if there would be anything that could be the basis for a charge?

A Not to my knowledge.

Q Just get him talking, is that right?

A As I remember correctly, to see what the sign said.

Q When you would talk about the stone you told him there was no stone coming in and no stone going to come in; is that right?

A No, I did not say that. On March 3 I asked him what he was doing there. He said he thought we had a little stone coming in that day. I told him we didn't.

Q You went further and said, "I am the guy would know and I am not ready for it for another couple of weeks."

A Basically, yes.

MR. MENAKER: I have nothing further.

MR. EVANS: Nothing further.

TRIAL EXAMINER: You are excused.

(Witness excused.)

TRIAL EXAMINER: What is the date of the restraining order?

MR. EVANS: The restraining order was issued on March 25 1969 according to my memory.

MR. MENAKER: I do not know. I do not think it is

material.

I might add we do think, it is our position it has expired by operation of law.

TRIAL EXAMINER: For what period?

MR. MENAKER: Under the Federal Rules of Civil Procedure a restraining order cannot be for an indefinite period of time.

TRIAL EXAMINER: Was this restraining order for a particular period?

MR. MENAKER: It is my understanding the Rules require it not be for more than ten days whether it states or not.

TRIAL EXAMINER: You requested --

MR. EVANS: As originally issued the TRO was granted until the date of the hearing before Judge Hughes in the Federal District Court which was March 31,1969.

At the conclusion of the hearing as shown in the testimony and transcript which is Trial Examiner's exhibit number 1, Judge Hughes, from the bench, said she would indefinitely extend her temporary restraining order until such time as she handed down an order one way or the other.

That is the status of the case today. We are still waiting for Judge Hughes' decision.

TRIAL EXAMINER:I do not know that this is material, Mr. Menaker, it occurred to me in writing up a chronology of events I might want to refer to the date of the restraining

order.

Do you have any more?

MR. EVANS: I have one more witness, Mr. G. G. Adams.

Whereupon,

G. G. ADAMS,

was called as a witness, by and on behalf of Counsel for the General Counsel, and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Evans.) Give us your name and address, please.

A My name is G. G. Adams. My address is 2313 Janis Lane, Fort Worth.

Q Mr. Adams, are you sometimes referred to as "Mickey?"

A Yes.

Q By whom are you employed, Mr. Adams?

A Thomas S. Byrne, Incorporated.

Q Your position with Thomas S. Byrne?

A Construction superintendent.

MR. MENAKER: Mr. Trial Examiner, I do object to testimony from this witness. It can go only to those matters for which this Trial Examiner now has pending before him a motion with regard to 16-CC-300, which I say is not properly before the Trial Examiner; therefore, this testimony is only for the purpose of prejudicing you against our position in the Dee Brown matter.

TRIAL EXAMINER: Wasn't the subject of the alleged activities involved in Byrne the subject of testimony before Judge Hughes?

MR. EVANS: Yes, sir, it was; however, there were two threats involved in the Thomas S. Byrne case, one directly against Mr. Patterson and Mr. Patterson did testify in that case, and one directed toward Mr. Adams as alleged in paragraph 10 of the complaint.

Paragraph 10 then refers to a threat by Mr. Lawrence O'Neil and we did not get that testimony in at the hearing and there is no reference to it in the transcript of that case.

It is an independent allegation of our complaint upon which we ask the Trial Examiner to rule and we think it properly before the Court, the Trial Examiner, on the basis of the authority I have previously cited.

TRIAL EXAMINER:I do not want to -- I want to bring this hearing to a close. I also want to preserve the rights of the respondent and the position of Mr. Menaker.

I am about to make a ruling.

It appears to me Mr. Menaker has something to say.

MR. MENAKER: Your Honor, all I want to point out to you in the transcript the court never ruled the testimony was admissible.

The Court also indicated it was going to reserve its

decision with regard to the Byrne-Citadel matter.

TRIAL EXAMINER: I am going to receive the testimony of this witness, subject to Mr. Menaker's objection. If I should conclude the settlement agreement must properly be set aside, I will entertain Mr. Menaker's motion to strike.

Let the record reflect he now so moves, consistent with the position he has taken throughout this hearing.

MR. MENAKER: Thank you, sir.

Q (By Mr. Evans.) You stated you were the job superintendent for Thomas S. Byrne, is that right?

A Yes.

Q Where are you employed for Mr. Byrne?

A At the Star Telegram Building at Sixth and Taylor.

Q Was this true on August 6, 1968?

A Yes.

Q On August 6, 1968 how many men did you have working under you?

A Approximately 60.

Q Did these include any foremen?

A Yes.

Q How many?

A Five or six.

Q Did you have a conversation with an agent of respondent on August 6, 1968 concerning McDonald stone?

A Yes.

Q Which agent?

A Lawrence O'Neil.

Q Do you know his position with the union?

A Yes, he is business agent.

Q What was said by each of you during this conversation, if you will please, quote to the best of your memory.

A Lawrence and I were together observing another worker there and he said, "Mr. Mickey, if you bring any more of McDonald stone on the job we are going to have to picket."

I said, "On what ground, Lawrence?" He said, "For using their stone." Let me change that. I said, "On what grounds, Lawrence? There is not any McDonald employees on the job." And, he said, "For using their stone."

Q Did you reply to that?

A No, I don't recall any reply that I made.

MR. EVANS: I pass the witness.

CROSS-EXAMINATION

Q (By Mr. Menaker.) Did any stone come on your job at that time?

A Later that day three more pieces came on to the job, yes.

Q Was there picketing?

A No. Were you asking me?

Q Yes?

A No, they weren't picketing at that time.

Q What he told you was not correct?

A They picketed --

MR. EVANS: I object to this. Mr. Menaker is going far beyond the scope of the direct, and, furthermore, the facts surrounding the delivery of McDonald stone on that day are well covered in the transcript; I think the testimony of Mr. Patterson.

MR. MENAKER: Not with regard to this witness it has not been covered.

TRIAL EXAMINER: Some stone came on the premises on that day.

Was there picketing?

THE WITNESS: No, there was no picketing.

Q (By Mr. Menaker.) Mr. Adams, has there ever been any picketing?

A Yes.

Q Let me finish my question.

A Yes.

Q Of that construction site at a time when there was neither stone nor or employees of McDonald Stone present?

A No.

Q Then there was one occasion when there was a picket who showed up at the time the truck carrying the McDonald stone came on the premises, is that right?

A That is right.

Q Came at the same time the truck came and left right after the truck left?

A No, I think you are mistaken there. I think the truck was there earlier.

Q I see, and then the picket came?

A And then the picket came.

Q Then the truck left and the picket left; is that right?

A Right.

Q Is that the only occasion when that union or this union picketed that site?

A Yes.

MR. MENAKER: Nothing further.

REDIRECT EXAMINATION

Q (By Mr. Evans.) What --

TRIAL EXAMINER: Wait a moment.

I do not want my question to be construed as a determination on my part the union was picketing the construction site I should have said; was that the only occasion when the union picketed at the site.

Q (By Mr. Evans.) What date was this picketing?

A August 7.

Q You said the picket left after the truck left; did it leave immediately after the truck left?

A Within a few minutes, yes; you might say immediately. I would say within 30 minutes the picket was taken off the

job.

Q At the time this picket was up there were there any McDonald employees or equipment on the job?

A No.

Q I hand you Trial Examiner's exhibit number 4.

A Yes.

Q I ask you is that the picket that patrolled?

A Yes.

Q On August 7?

A Yes.

Q What happened when that picket went up?

A I --

TRIAL EXAMINER: I think the witness might identify a picket sign, but I do not think he can identify the picket from that picture.

Q (By Mr. Evans.) Excuse me, the picket sign.

A Yes.

Q I was referring to the sign. Is that the sign that was used by whoever was patrolling the premises?

A Yes, whoever is holding that sign is the picket.

Q How many employees -- what happened when that picket went up?

A All the employees refused to go to work.

Q How many employees were there on the job at that time?

A There was approximately 60.

Q Who were they employed by?

A Thomas S. Byrne, Incorporated and General Engineering, the sub-contractor.

Q Now, in this picture is that McDonald stone loaded up on the bed of that trailer?

A Yes, sir.

Q This trailer has the license plate number Z43 451. Do you know if that is a McDonald trailer?

A No, that is not a McDonald trailer.

Q The tractor to which it is attached, was it attached to a tractor at that time?

A Yes.

Q Was that a McDonald tractor?

A No.

Q The day before the picket went up as Mr. Menaker brought out, some McDonald stone did come on the job that afternoon did it not?

A That is right.

Q Who brought it on the job?

A Mr. Bill Scroggins who is an independent contractor.

Q How many pieces of stone came on that afternoon?

A I recall three.

MR. EVANS: I pass the witness.

RECROSS EXAMINATION

Q (By Mr. Menaker.) Mr. Adams, I take it as that picture

shows that picket patrolled during the time the truck was there; was it right up close to the truck?

A Yes.

Q He stayed as close to the truck as he could get?

A That is right.

Q Besides the picket sign which was there was there any appeal to any employees? Did he say, "Come on fellows, get off. Look at the sign."

Did he have any comments?

A No.

MR. MENAKER: Nothing further.

REDIRECT EXAMINATION

Q (By Mr. Evans.) When that sign went down what did the employees do?

A They all went to work.

MR. EVANS: Nothing further.

MR. MENAKER: Nothing.

TRIAL EXAMINER: You are excused.

(Witness excused.)

TRIAL EXAMINER: Are counsel in agreement that McDonald's place of business has been picketed by the union?

MR. MENAKER:Yes, sir.

MR. EVANS: As I understand it there are two plants in Fort Worth. There has been picketing going on and off since August 1, 1968.

This is covered in the opening statement of counsel for respondent.

TRIAL EXAMINER: Is that all?

MR. EVANS: That is all I have, your honor.

TRIAL EXAMINER: Mr. Menaker?

MR. MENAKER: I have one witness I wish to put on.

TRIAL EXAMINER: I think I should inquire from either charging party if they have a witness?

Do counsel for the charging parties have a witness?

MR. KELLER: No witness.

MR. PARKER: No witness.

TRIAL EXAMINER: Proceed, Mr. Menaker.

MR. MENAKER: Mr. Wallace.

Whereupon,

JOHN WALLACE,

was called as a witness, by and on behalf of the respondent, and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Menaker.) Give us your name and your address.

A John Wallace. I live at 5232 McQuade, Fort Worth, Texas 76117.

Q Mr. Wallace, it has already been stipulated to, but just as introductory matter, you are and have been acting as an agent for local 859 of the Laborers International Union of

North America, have you not?

A Yes.

Q In that connection, Mr. Wallace, did you have anything to do with making up certain sign, a certain sign which is commonly called a picket sign?

A I had all of the signs made up.

Q Now, there is in evidence, sir, a document which has been marked and identified as Trial Examiner's exhibit number 4.

Will you refer to that, please, and tell me whether or not that is a picture of a sign that has been made up?

A That is one of the signs that was made up.

Q Are there any other signs that were made up?

A Yes, there is.

Q Will you tell the Trial Examiner, please, what differences if any there are between those signs and the sign shown in the exhibit before you?

A The other sign stated "employees" where this one states "products."

TRIAL EXAMINER: Are you trying to dispute the testimony on page 21 before Judge Hughes concerning the content of the sign?

MR. MENAKER: No, sir, I am attempting to expand on it. I do not dispute it.

Q (By Mr. Menaker.) Now, with regard to Mr. Mullens, can you

tell me whether or not he was equipped with one or more signs?

MR. EVANS: Objection, that is hearsay.

If this man was not out at the job site he cannot testify as to what Mr. Mullens had in his possession.

TRIAL EXAMINER: He can testify whether he saw Mr. Mullens with a particular sign.

MR. EVANS: That is hearsay, too.

Q (By Mr. Menaker.) Did you give Mr. Mullens any particular sign?

A I gave Mr. Mullens and all pickets two picket signs. Each one of them had two picket signs assigned to them.

Q They were the two you described in testimony?

A They are.

Q Did you give the pickets who went to the Citadel and Byrne's job instructions as to how they were to conduct themselves?

A I certainly did.

MR. EVANS: Objection.

TRIAL EXAMINER: He may answer.

Q (By Mr. Menaker.) What were those instructions, please?

A The instructions were that they would picket the stone or the material of McDonald Brother Stone; that they would get as close to the truck as possible, and that they would try not to create any disturbance on the job amongst the

other people. Not to talk to or encourage anyone else to engage in conversation with them.

Q Were there any instructions as to what -- when they would use one sign and then when they were to use another sign?

A Yes, there was.

Q Would you detail those, please?

A They were told to use the picket sign that read "employees" when one of McDonald's drivers or his other direct employees were delivering the stone on the job.

The other sign was to be used when the stone was hauled to the job site by another carrier.

Q So far as you know were those instructions followed?

A On --

MR. EVANS: Objection.

TRIAL EXAMINER: I do not know he would have any basis for knowing whether the instructions had been carried out.

Q (By Mr. Menaker.) With regard to the times of the displaying of either of these two signs, what were your instructions?

A I am not sure.

Q Were the pickets to be there all day and all night; ten minutes or what?

A The pickets were instructed to follow the truck to the jobsite or wherever the truck might go and picket when the

truck pulled in on the jobsite and leave immediately when the truck left.

MR. MENAKER: No further questions.

CROSS-EXAMINATION

Q (By Mr. Evans.) Did you sir, dispatch Mullens to the jobsite of Dee Brown Masonry, the Dallas Toll Building?

A Yes, I did.

Q Has he been paid by the union to maintain himself at those premises?

A He has been paid an allowance for all of the times he has been carrying a picket.

Q By carrying a picket you mean --

A He has been receiving pay each week for the purpose of following trucks.

Q Is he paid even if he is not picketing?

A If he is not picketing he is normally picketing out at the plant.

Q But when he was stationed at Dee Brown's jobsite at Dallas, was he being paid just to sit there and watch and see if any McDonald trucks or any trucks with McDonald products came on the job?

A He was.

Q He was paid by the local union, is that right?

A Yes.

Q He was picket captain at the Citadel construction site

at Denton, Texas; is that not correct?

A Actually, not on any particular job. He was more or less being picket captain when I was not there at the plant.

Q So, he has from time to time been the picket captain for the Laborers' local during this labor dispute at McDonald?

A On the few occasions when I would be out of town.

Q Did you take part in constructing this picket sign shown in Trial Examiner's exhibit number 4?

A Yes.

MR. MENAKER: You mean the physical work?

MR. EVANS: Yes.

THE WITNESS: I sure did. I believe that is my writing there if I am not mistaken.

Q (By Mr. Evans.) This picket sign, did you write that this picketing only directed for employees of McDonald Stone products; is that correct?

A Yes, sir.

Q It says at the top, "Don't buy products from McDonald Stone?

A Right.

Q In other words, you did not want the employees of McDonald Stone buying McDonald stone. Is that its purpose?

MR. MENAKER: I will object to that. It speaks for itself, sir.

TRIAL EXAMINER: Let him answer.

THE WITNESS: The purpose for that was to show we were only picketing McDonald Stone. We were not trying to encourage other people to stop work when we had the picket on the job.

Q (By Mr. Evans.) You were not trying to encourage any employees of McDonald that might be there; right?

A We were trying to -- I think you have me confused.

TRIAL EXAMINER: I think the union must have prepared the signs under the guidance of counsel. Counsel for respondent will take the position the conduct engaged in was lawful.

This will be argued in the brief.

Am I correct?

THE WITNESS: Yes.

TRIAL EXAMINER:You had advice?

THE WITNESS: Yes.

Q (By Mr. Evans.) Mr. Wallace, did you go to the premises of the Star Telegram jobsite in August 7?

A Yes, I did.

Q When you arrived the picket was still patrolling, was he not?

A Yes.

Q The picket did not leave until you instructed him to; is that right?

A Yes.

Q You did not instruct him to leave until you were satisfied the truck carrying McDonald Stone's product had left;

is that correct?

A That is correct.

MR. EVANS: No further questions.

MR. MENAKER: No further questions subject to our motion which we would renew at this time.

TRIAL EXAMINER: You are excused.

(Witness excused.)

MR. EVANS: We have one rebuttal witness.

TRIAL EXAMINER: Very well.

MR. EVANS: Framk Thomason.

Whereupon,

FRANK THOMASON,

was called as a witness, by and on behalf of Counsel for the General Counsel, and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Evans.) State your name and address.

A Frank Thomason. I live at 2114 Navajo, Denton, Texas.

Q By whom are you employed, Mr. Thomas?

A Citadel.

MR. MENAKER: Mr. Examiner, I make the same motion I made with regard to Byrne.

TRIAL EXAMINER: I will receive it subject to the limitation I placed upon the earlier testimony.

Q (By Mr. Evans.) Was this the case ON December 27,

1968? Were you employed by Citadel on that date?

A Yes.

Q Where?

A Denton, Texas.

Q What construction site?

A Women's Dormatory.

Q North Texas State University?

A Yes, on Maple Street.

Q There has been testimony about some picketing, instruction -- was there picketing on December 27, 1968?

A There was.

Q Did you converse with any men carrying picket signs?

A I did.

Q How many men did you talk to?

A Two.

Q During your discussions with either one of these two men did they ask to -- strike that.

Where did they picket?

A In the streets.

Q During your conversation with these two men did either one of them ask to come inside the construction project premises?

A I --

MR. MENAKER: Objection. Hearsay. I do not know who these two men are.

MR. EVANS: I am referring to the men carrying the signs, of Laborers Local 859.

MR. MENAKER: That has not been established.

TRIAL EXAMINER: Can you identify any pickets?

THE WITNESS: I don't recall their name. We had their name, Greenwood was one. Mr. Greenwood was one and I do not recall the other one.

Q (By Mr. Evans.) And --

MR. EVANS: Mr. Trial Examiner, testimony was let in from respondent as to what Mr. Wallace told someone, identified the pickets, whoever happened to picket the Citadel Construction jobsite.

Therefore, I think it is just as relevant and just as valid evidence as to what these men actually did picket, did do and say.

TRIAL EXAMINER: That is not the immediate problem. Let's get the pickets identified as well as we can.

Do you recall whether there was a picket sign?

THE WITNESS: Yes, there was a picket sign.

TRIAL EXAMINER: Do you recall what the sign said?

THE WITNESS: I --

MR. EVANS: Excuse me, can we use the photograph to help him refresh his recollection?

TRIAL EXAMINER: If it will help him.

Q (By Mr. Evans.) Mr. Thomason, were the signs the same or

different from that which appears in this photograph, Trial Examiner's exhibit number 4?

A I would not say they were exactly the same. We do have pictures of signs. I would not identify that as being the same, but it would be approximately the same.

MR. MENAKER: Mr. Trial Examiner, may I take this witness on voir dire at this time?

TRIAL EXAMINER: Just a moment, if you please.

The sign or signs you saw on December 27, was there a signature of any picketing organization?

THE WITNESS: There was, yes, sir. The organization was local 859. It was against McDonald Stone Company.

TRIAL EXAMINER: The sign said so?

THE WITNESS: It wasn't against Citadel.

TRIAL EXAMINER:One of the pickets was named Greenwood?

THE WITNESS: Greenwood was one.

TRIAL EXAMINER: Very well.

MR. MENAKER: Just one question.

TRIAL EXAMINER:Yes.

MR. MENAKER: Are you sure it was local 859? Could it have been local 790?

THE WITNESS: No, we did have one later local 790, but this one was --

MR. MENAKER: No further questions.

Q (By Mr. Evans.) The picket sign did have the legend on

it, signature of Local 859?

A Right.

Q Did it have any company names on it?

A McDonald Stone Company.

Q Did it have any other company names on it?

A No.

Q At any time during their patrolling did these men carrying these picket signs ask to come into the construction site?

A No.

Q Did you have any conversation with these men?

A I did.

Q Tell us -- were they picketing at gates?

A Yes.

Q They were?

A Yes.

Q How many gates were there?

A There were four and they were picketing two.

Q Which two were they picketing?

A The north gate and the south gate.

Q Tell the Trial Examiner what was said by you and the picket at the north gate.

MR. MENAKER: Objection to hearsay. They are still unidentified. I still do not know who they are. It is hearsay.

TRIAL EXAMINER: Did you have any conversation with

Greenwood?

THE WITNESS: I did.

TRIAL EXAMINER: Tell us about that conversation.

THE WITNESS: He told me Mr. Breeding has sent him up there and it would take an injunction to move him or it.

MR. MENAKER: I have my objection.

TRIAL EXAMINER:You have an exception to my question if you wish it.

MR. MENAKER: Yes, I certainly do.

TRIAL EXAMINER: You have it.

Q (By Mr. Evans.) At the time these pickets were patrolling, who was in charge of the job for Citadel?

A I was.

Q How many employees did you have?

A Approximately 120.

Q Under -- approximately 120 men under you?

A Yes.

Q Did these include some foremen?

A Yes.

Q How many?

A Approximately six.

MR. EVANS: Nothing further.

MR. PARKER: I have a question.

TRIAL EXAMINER: Proceed.

Q (By Mr. Parker.) Prior to the conversation you just

testified to that you had with Mr. Greenwood on the picketing, did you ever talk to Mr. Greenwood before then?

A No.

Q Did you ever have any conversations with Mr. Greenwood in your office?

A The man came to my office and told me if I --

MR. EVANS: Objection, not responsive.

TRIAL EXAMINER: The question is whether you talked with Mr. Greenwood in your office.

THE WITNESS: It may not answer the question.

TRIAL EXAMINER: If you can't answer the question don't try to.

THE WITNESS: All right.

Q (By Mr. Parker.) Did you have any conversation with anyone in your office?

A I did.

Q Did you know who this individual was?

A No.

Q At that time?

A No.

Q Did you later identify who this man was?

A I did.

Q Who did you identify this man as?

A Greenwood.

Q How did you identify him as Greenwood, later?

A By registration of his automobile.

Q Was he the same man you talked to on the picket line?

A Right.

Q Will you tell us what the conversation was in your office?

MR. MENAKER: I object on the basis of hearsay and a proper predicate has not been laid.

TRIAL EXAMINER: I will overrule it.

THE WITNESS: He told me if I got any more of McDonald Stone that -- excuse me. He told me I was not going to get any more McDonald stone if I did not get a picket.

MR. PARKER: No further questions.

CROSS-EXAMINATION

Q (By Mr. Menaker.) Tell me when this was when this conversation took place?

A The best of my recollection on that was February 10.

Q What year?

A 1969.

Q 1969?

A Yes.

Q This would have been several months after the picketing incident?

A I have not reread the statement that I made. I may have those dates -- they are in the statement.

Q Then, of your own knowledge, you just don't know when

this conversation took place?

A It was a few days before the pickets went up.

Q A few days before the pickets went up?

A Yes.

Q You say you identified the man by his registration.

A Yes.

Q Did you go out and look at the car plates?

A I got his car plate number and called Fort Worth license bureau and they gave me the man's name and one of my foremen went to them and they said who the man was.

Q Wait a minute. Then you yourself do not know what the man's name is, you only know the man you spoke to was a man who drove a car whose license plates were reported to you by someone else as being Greenwood's; is that right?

A Right.

MR. MENAKER: I renew my motion to strike this witness' testimony about the conversation.

TRIAL EXAMINER: I deny it.

Q (By Mr. Menaker.) Now, Mr. Thomason, when the picket came did he come at the same time the truck carrying McDonald's stone came on the premises?

A A few minutes later.

Q With regard to when the truck left when did the picket leave?

A They left.

Q Right away?
A Yes.
Q When the truck came in do you remember which gate it came in?
A It came in the south gate.
Q That is where they threw the picket up, is that right?
A One on the south gate and one on the north gate.
Q Did they unload the stone? Was the stone unloaded that day?
A The 27th?
Q Yes? The fact is it was?
A The best I remember it was.
Q Even though there was a picket there the stone was unloaded?
A Right.
Q You didn't see any of the pickets approach anybody else and say to them anything about coming off the job?
A They didn't say anything.
Q No conversation?
A Right.
Q The conversation you had with this man you have identified, on that occasion, was a conversation you started, isn't it?
A Right.
Q You walked up to him, he did not approach you?

A Right.

Q Isn't it true your company had prior to that time received a letter saying there would be some picketing going on in connection with McDonald stone?

A We had a form that was presented.

Q I hand you what has been marked Trial Examiner's exhibit number 2 and ask you if your company did not get a letter that was identical and the same except the name was McDonald instead of Byrne? Citadel instead of Byrne?

A If the company got one I don't know anything about it.

Q Then you really don't know if of your own knowledge, whether anybody asked for permission to come on the premises or not?

A Well, they did not ask me.

Q You did not give them permission to come any closer to that truck than they got, did you?

A I did not.

Q Did anybody hand you a form on the day in question?

A I beg your pardon.

Q Did anybody hand you a form like that on the day in question, on December 27, sir?

A No.

Q Now, you commented that Mr. Greenwood said something about Breeding sent him up there and it would take an injunction to move him?

A He did.

Q The fact is he moved voluntarily as soon as the truck left?

A He did.

MR. MENAKER: Nothing further.

MR. EVANS: Just one question.

REDIRECT EXAMINATION

Q. (By Mr. Evans.) How many employees ceased work when the picket went up?

A There were approximately 60.

Q Were any of these McDonald employees?

A There were no McDonald employees on the job.

MR. EVANS: No further questions.

MR. MENAKER: Nothing further.

Q (By the Trial Examiner.) Did the stone arrive in a McConald truck?

A No, sir.

Q Or vehicle?

A No.

TRIAL EXAMINER: No further questions.

REDIRECT EXAMINATION

Q (By Mr. Evans.) Whose truck did it arrive on?

A Ben Loper from Lubbock, Texas.

Q Who hired Loper?

A I did.

MR. MENAKER: Mr. Examiner, we have a stipulation in the transcript before you covering that. Are you seeking to go behind the stipulation?

MR. EVANS: No. I thought I would complete the question there. I did not want to leave it hanging like that.

TRIAL EXAMINER: I think I started this.

MR. EVANS: Nothing further.

TRIAL EXAMINER: That is all.

(Witness excused.)

TRIAL EXAMINER: Is that all?

MR. EVANS: General Counsel has nothing further.

TRIAL EXAMINER: Are we ready to turn to the exhibits?

I declined to rule on the motion concerning exhibits 1(a), 1(b) and 1(c) and 1(d).

There is no problem about Trial Examiner's 1 through 4. There is no objection of any connsel to the receipt of those exhibits.

I hear none. I will receive them.

I believe we can dispense with duplicates because duplicates go to the Regional Office. I think the Regional Office already has duplicates of the documents which have been marked Trial Examiner's 1 through 4.

Subject to the objection made by counsel for the respondent, subject to recnnsideration by the Examiner of his motion, in the light of briefs to be filed with me, and

in the light of the results of my independent research, I will receive in evidence the remainder of the exhibit. But I want to afford counsel for respondent an opportunity now to object to the receipt of General Counsel's 2, 3 and 4 if he so desires.

MR. MENAKER: I do not object to 2 and 3. I do object to four on the grounds there is no authority within the Rules and Regulations and no prescedent within the courts for the unilateral setting aside of the agreements shown by 2 and 2 and 3.

TRIAL EXAMINER: I will give reconsideratinn.

I will receive General Counsel's exhibit 1, 2, 3 and 4 in their entirety.

(The documents heretofore marked General Counsel's exhibit 1(a) through 1(d) for identification were received in evidence.)

MR. EVANS: Mr. Trial Examiner, may I substitute copies for the Trial Examiner's exhibits 2, 3 and 4 so I may return the originals to the District Court. I have photostatic copies.

TRIAL EXAMINER: Yes.

It seems to me we can dispense with duplicates of all of General Counsel's exhibits. Duplicates already appear in the Regional Office file.

I will fix Wednesday, May 14, 1969 as the date for the submission of briefs, or proposed findings or conclusions.

They will at that time be addressed to me care of Mr. George Bokat, Chief Trial Examiner, National Labor Relations Board, Washington, D. C. 20570.

I do not understand there will be occasion for any counsel to ask for an extension of time, but if you should need one, I will point out a request for an extension of time must be made at least three days in advance of May 14, 1969 and notice of such request to opposing counsel.

You gentlemen are all experienced before the Board so I will not read the closing statement that relates to procedure.

MR. EVANS: I will waive it.

MR. MENAKER: I will waive it.

TRIAL EXAMINER: Is there anything else before we close the hearing?

I hear nothing.

The hearing is closed.

(Whereupon, the hearing in the above-entitled matter was closed at 1:30 o'clock p.m.)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

NATIONAL LABOR RELATIONS BOARD)
)
Petitioner)
)
VS.) CIVIL ACTION NO. 3-3072-B
)
LABORERS' INTERNATIONAL UNION)
OF NORTH AMERICA, LOCAL 859,)
AFL-CIO)
Respondent)

- - - - - -

BE IT REMEMBERED that on the 31st day of March, 1969, at Dallas, Texas, before the Honorable Sarah T. Hughes, United States District Judge, and without a Jury, the following proceedings were had in the above styled and numbered cause:

- - - - - -

APPEARANCES:

THE NATIONAL LABOR RELATIONS BOARD, Ft. Worth, Texas,
By: Mr. Everett Rhea
Mr. David Evans

For the PETITIONER

MR. MARVIN MENAKER, Dallas, Texas

For the RESPONDENT.

- - - - - -

I N D E X

WITNESSES

EXHIBITS

- - - - - -

PROCEEDINGS

Dallas, Texas
March 31, 1969

THE COURT: All right, Mr. Reea.

MR. REEA: If it please the Court, I would like to introduce Mr. David Evans of our staff, and he will interrogate the witnesses, and I will ask him to proceed, if it is agreeable with the Court.

THE COURT: All right, he has been admitted to the Northern District of Texas?

MR. EVANS: I am a member of the State Bar, Your Honor.

THE COURT: Well, you had better introduce him, then, so he can be admitted to practice before the Northern District of Texas.

MR. REEA: All right, Your Honor, I will do that. I do want to recommend him for admission to this court to practice in the Northern District of Texas. He is a member of the Texas Bar, a graduate of Texas University, and I recommend him as to character, for admission to this court.

THE COURT: All right, will you hold up your right hand and repeat after me --

MR. MENAKER: Your Honor, excuse me, I have two more that I would like to introduce too.

THE COURT: You do -- all right. Suppose you

introduce them at the same time.

MR. MENAKER: Your Honor, I would like to introduce to the Court Mr. James C. Barber, who has just joined our firm. Mr. Barber is a 1965 graduate of the University of Texas, and he has just completed three years in the Judge Advocate's General's Corps in the United States Navy, and I do vouch for his character and I think he will make a valuable addition to this court.

I would also like to introduce Mr. Joseph Parker, who is one of my opponents in this case, but who has also been admitted to practice before the Supreme Court of this state, and whom I know to be a very fine and adequate lawyer, and whose admittance to this court I do recommend.

THE COURT: Will you all hold up your right hand and repeat after me, please.

(At this time, the Court administered the oath to attorneys Evans, Barber, and Parker.)

THE COURT: Who is going to explain the case very briefly at this time?

MR. RHEA: Your Honor, I think Mr. Evans will take over at this time and I will supplement later at one point or another.

THE COURT: All right.

MR. EVANS: Would Your Honor like to hear an opening statement? Or, shall we go into the stipulations?

THE COURT: No, I would like for you to make a very short opening statement, and Mr. Menaker to do the same.

MR. EVANS: Your Honor, this is the case of past secondary activity and threatened future secondary activity. In August of 1963 the Union threatened to picket the construction site of the Star Telegram Building in Fort Worth, Texas, where Thos. S. Byrne was engaged as the general contractor. The president of Thos. S. Byrne was informed that if he purchased McDonald stone, that the premises would be picketed. That was August 6, 1963. On August 7, the premises were picketed after an independent hauler brought the stone, McDonald stone, to the premises of the Star Telegram construction site.

On December 27, 1963, after McDonald stone was delivered to the construction site at North Texas State University at Denton, Texas, a picket went up. This stone had been delivered again by an independent contract hauler.

The most recent case before the Court and the threatened future activity is as follows. On March 3, 1969, Respondent-Union stationed an agent or one of its agents at the premises of the Dallas telephone construction building site here in Dallas, and on March 12, 1969, Respondent's agent, Mr. R. P. Virall, informed the president of D. Brown Masonry, Inc., Mr. Dewitt Brown, that if McDonald stones were brought on the premises, that there would be picketing of any

truck that brought it on.

The agent of Respondent had been informed that an independent contract hauler was going to deliver the stone to the job site and that no McDonald employees or equipment would be coming on the job site. The same is true of the Star Telegram job site referred to previously in August, 1968, and the pickets at the North Texas State University construction site in Denton were also informed that no McDonald employee or equipment were on the job site.

Therefore, Your Honor, we have before us a case of past activity of following the product, no matter whether or not employees of the primary employer, McDonald, were on the job site or not and picketing, and we have before the Court threatened picketing, if McDonald stone is brought to the premises of the Dallas Telephone construction site.

THE COURT: All right, Mr. Menaker.

MR. MENAKER: If the Court please, with regard to the two earlier matters, the Byrne matter and the Citadel matter, we respectfully take the position that the Court should strike that from the pleadings. These incidents did occur.

We point out to the Court that pursuant to the rules and regulations of the National Labor Relations Board, a Settlement Agreement was entered into between this Local Union, the charging party, and the Respondent Director, and pursuant to that Settlement Agreement we did not acknowledge

that we had violated any law, but we did in the interest of settlement post notices to take other affirmative action as a part of the Settlement Agreement.

We have not violated that Settlement Agreement and there has not been any picketing against either Byrne or Citadel in connection with their dealings with McDonald Stone and therefore we do not believe that under the statutes or under the rules and regulations of the National Labor Relations Board that the Regional Director has authority to set that aside.

Notwithstanding that, the third matter, the matter of the D. Brown Masonry Corporation is, I think, before the Court properly, and it is our position that we have not at this time picketed. Although, I tell the Court and I am not attempting to evade it, that we have made statements and it is our intention, subject to any lawful Order of this Court that it is our desire to picket the product of McDonald Stone Products Company, with whom we had a primary dispute and have been in a primary labor dispute since approximately July of 1968.

It is our contention that anywhere that product goes and it is identifiable as such, that we do desire to picket either the personnel or the product as such. We do not intend, and I think our evidence will be clear, we do not intend to picket any job site as such, but the product —

while it is on a truck and identifiable as the product of McDonald Stone -- is what we seek to be able to do. We say it is a primary picket that is lawful, and in the alternative, that it does meet the requirements of publicity picketing, and in this particular case depending upon the facts as they come out in the hearing, it may well be that the D. Brown Masonry Company has made themselves an ally of McDonald Stone. That is subject to the proof, but because of the shortness of time and inability of discovery, I have not as yet been able to determine whether I have a valid defense on that point yet.

THE COURT: Now, would you like to state what your stipulations are?

MR. EVANS: Yes, Ma'am.

Petitioner proposes the stipulation that Thos. S. Byrne, Inc., is a Texas corporation maintaining its offices in Fort Worth, Texas, and purchases goods valued in excess of $50,000 from states of the United States other than the state of Texas.

THE COURT: I think you might go ahead and state all of your proposed stipulations and Mr. Menaker can then state whether he agrees or disagrees with them.

MR. EVANS: Yes, Ma'am.

Second -- The Petitioner proposes the stipulation that Citadel Construction Company, Inc., is a Texas corporation maintaining its principal office and place of business in San

Marcos, Texas, and that said corporation purchases and sells $50,000 worth of goods and materials to and from states of the United States other than the state of Texas.

Stipulation No. 3 -- That Acme Brick Company, doing business as McDonald Brothers Cast Stone Co., is a division of the Fort Worth corporation, a corporation incorporated in the state of Texas, maintaining its principal office and place of business in Fort Worth, Texas; and in the operation of its business Acme purchases and sells $50,000 worth of goods and materials across the state line of Texas.

Stipulation No. 4 -- That Southwestern Bell Telephone Company maintains its principal office and place of business in St. Louis, Missouri, and various other offices throughout the United States, where it is engaged in the business of transmitting and receiving local and long distance telephone messages; and that Henger Construction Company is a Texas corporation that purchases $50,000 worth of goods from outside the state of Texas.

These are all of my commerce stipulations.

MR. MENAKER: Your Honor, with regard to jurisdiction, we have no personal knowledge, however, if Mr. Evans will state as an officer of the Court that he is satisfied after investigation that they are true, we will not require any proofs of those matters.

MR. EVANS: Yes, Your Honor, we have affidavits in

our files from principals of all these corporations reflecting the facts which I've just recited to the Court.

THE COURT: All right -- Then, they are stipulated, are they not, as I understand?

MR. MENAKER: Yes, Ma'am.

MR. EVANS: The Petitioner proposes the stipulation that Respondent has picketed at McDonald's plants at 2321 West 7th and 3501 Fairview in Fort Worth, Texas, since on or about July 1, 1968.

MR. MENAKER: McDonald Stone -- so stipulate.

MR. EVANS: We will propose the stipulation that Mr. R. P. (Bud) Vinall and Mr. John Wallace are agents of Respondent within the meaning of Section 213 of the Act.

MR. MENAKER: We so stipulate.

MR. EVANS: I believe these are all the stipulations I propose at this time, Your Honor.

THE COURT: All right, do you wish to propose any further stipulations, Mr. Menaker?

MR. MENAKER: Mr. Evans, would you be kind enough to put the Settlement Agreements into evidence, and by stipulation that they were entered into and that there had been no picketing since the entering of those two agreements -- against Byrne and Citadel?

MR. EVANS: Yes.

MR. MENAKER: Your Honor, I propose to offer into

evidence two Settlement Agreements entered into between the Respondent, the Petitioner and the appropriate employer, and that since the entry of such Settlement Agreements, that there has been no picketing; and the Settlement Agreements as to those two named employers, the agreements have been observed in all things.

(Instruments marked by the reporter as Petitioner's Exhibits Nos. 1 and 2, for identification.)

THE COURT: Will you agree to the stipulation?

MR. EVANS: We so stipulate, Your Honor.

MR. MENAKER: We further propose to stipulate that we have had a primary labor dispute with McDonald Stone at all subsequent times.

MR. EVANS: So stipulated.

MR. MENAKER: That's all I have at this time, Your Honor.

THE COURT: All right, what witnesses do you wish to call?

MR. EVANS: We have four witnesses, Your Honor, Mr. D. Brown, the president of D. Brown Masonry Corporation; his foreman; the president of Thos. S. Byrne, Mr. James Patterson; and the job superintendent of Citadel Construction Company, the one referred to at North Texas State, and his name is Frank Thompson.

THE COURT: Will those persons please stand up and

be sworn, and hold up your right hand.

(At this time, the oath was administered by the Deputy Court Clerk to the witnesses heretofore named.)

THE COURT: Whom do you wish?

MR. EVANS: We would call Mr. D. Brown, Your Honor.

C. DEWITT BROWN, JR.,

the witness hereinbefore named, having been sworn to testify to the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. EVANS:

Q State your name and address, please.

A D. Brown or C. Dewitt Brown, Jr., Post Office Box 28335 or 12411 Shilo Road, Dallas, Texas.

Q By whom are you employed, Mr. Brown?

A D. Brown Masonry, Incorporated.

Q What is your position with D. Brown Masonry, Incorporated?

A President and owner.

Q What business is that company in?

A Masonry construction.

Q What part of the Southwestern Bell Telephone Toll Building does D. Brown Masonry, Inc. have?

A All of the masonry construction portion, which includes pre-cast exposed aggregate panels, limestone, brick, block.

and all other facets of that.

Q Who is your construction contract with?

A Henger Construction Company.

Q What is the dollar volume of your contract with Henger?

A $966,404.

Q Who is your principal supplier of pre-cast stone paneling?

A McDonald Brothers Cast Stone Company.

Q What is the value of that contract?

A $115,000.

Q Did you have a conversation with Mr. R. P. (Bud) Vinall on or about March 12, 1969?

A I did.

Q Will you tell the Court what was said during that telephone conversation?

A I told Mr. Vinall that I was about ready to have stone delivered on the above subject job, that I was buying the stone f.o.b. McDonald's plant; I asked him if he was going to picket me, and he stated, "Yes"; that he was going to picket the stone whenever and wherever the opportunity presented itself.

Q Was there any further conversation at that time?

A Yes, he said that he was -- I told him that under those circumstances that I was going to take whatever action

that was available to me under the law to protect myself and my client, and I was talking about Southwestern Bell Telephone Company and Henger Construction Company, in getting the stone on the job and getting the job done, and he said, "I understand you have to do what you have to do and I have to do what I have to do."

Q Can you remember anything else that was said during that conversation at this time? Did you advise him of any action you had taken theretofore?

A I told him that I had made arrangements to have -- to buy the stone f.o.b. McDonald Brothers' plant and that I would have an independent contract hauler pick this material up and haul it to the job site.

MR. EVANS: No further questions.

CROSS EXAMINATION

BY MR. MENAKER:

Q Mr. Brown, let's put this in perspective, if we may -- who initiated the conversation, did you call or did he call?

A I called him.

Q And you were requesting of him information, he was not coming at you and leaning on you to say, "This is what I am going to do, whether you like it or not"?

A That's right -- we had had a man there who said that he was on the job to picket the stone --

Q Now, just a moment, let's not talk about what somebody

else said unless you were present. Let's restrict it to this conversation you had, Mr. Brown.

A All right.

Q The point is — you initiated the conversation and he was responding to your questions, is that right?

A That's right.

Q Is it not correct, Mr. Brown, for me to say that generally speaking that you and this particular Local Union have a good relationship?

A Yes.

Q So for you to have a conversation to discuss a problem was not in itself unusual in any way?

A That's right.

Q Now, have you had stone delivered out there from McDonald Stone out to that job site in the last week?

A Yes.

Q Who brought the stone, please?

A ITS.

Q ITS, and who hired ITS?

A I did.

Q And can you tell me how many times you have hired an independent carrier to haul McDonald Stone products to your job sites this year?

A One time.

Q That was last week?

A That's right.

Q The normal procedure, is it not, for you to buy stone from McDonald Stone Company is for them to deliver it to the job site, is that right?

A That's right.

Q And I take it that you have had a rather substantial business relationship with McDonald Stone in, say, the last year?

A That's right.

Q Can you give me some estimate of the volume of business you have had with McDonald Stone in the last year?

A I could only guess.

Q Well, I don't want you to guess -- I understand you are not going to be right close at it, but would it be something like $250,000 or $500,000, or as close as you can give it to us?

A Well, like I say, without checking my records -- this is purely speculation -- but I would say $250,000 would be realistic.

Q Would that be in one order or would that be in many orders spread over the last twelve months?

A It would be in several orders.

Q And in every other instance the material was bought and delivered to your job site by McDonald Stone, is that right?

A That's right.

Q McDonald Stone does have its own trucks and does normally make deliveries.

A Yes.

Q And this particular situation was an isolated instance where special arrangements were to be made, is that right?

A That's right.

Q Do you normally hire trucks to bring goods to your job site for other products other than McDonald stone?

A Only on occasion.

Q You yourself don't run any trucks, and I'm talking about — I understand you may have a pickup or something like that to bring the tools and things like that, but in terms of bringing products, you are using in construction, do you normally run trucks?

A Yes.

Q Do you normally use them in connection with McDonald Stone?

A No.

Q Now, did you get an allowance from McDonald Stone for the delivery?

A I told the McDonald Stone Company that I was going to buy the material f.o.b. their plant, less my delivery costs due to the fact that this was a job that Southwestern Bell Telephone had no — this was over a dispute that was not between myself or Southwestern Bell, and I did not want to tie

up Southwestern Bell's facilities -- they have early warning aerial systems that go through there; they have the telemetering water system; all the FAA navigational systems; they have communications to SAC bases; they have many goveranment communications that go through there and I felt that I could not afford to subject them to any labor disputes, and on the other hand I did have a contract to perform, and I had to execute the work on this job so as not to delay construction.

Q Mr. Brown, what I'm trying to get at -- is there anything else you want to say about that -- I don't want to cut you off.

A No, that's all.

Q What I'm trying to get at is that what you did -- you ended up paying exactly the same net price that you pay for McDonald stone that is normally put on the job site by McDonald, except that you made an arrangement in this case that you would substitute yourself for the delivery agent and make an arrangement for an independent carrier, and deduct that from what you would normally pay when they make delivery -- is the question clear?

A Well, the only thing that bothers me -- I told them that I would pick it up f.o.b. their plant, and that the cost to me would be less my delivery costs.

Q So that the actual net cost to you would be the same?

A I didn't ask him -- I told them this.

MR. MENAKER: I have nothing further, Your Honor.

MR. EVANS: No further questions, Your Honor.

THE COURT: All right, you may step down.

(At this time, the witness Brown was excused from the witness stand as stated.)

MR. EVANS: We call Mr. Lawrence C. Drake.

LAWRENCE C. DRAKE,

the witness heretofore named, having been sworn to testify to the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. EVANS:

Q State your name and address, please, Mr. Drake.

A Lawrence Drake, 2428 Inadale, Dallas, Texas.

Q By whom are you employed, Mr. Drake?

A D. Brown Masonry Corporation.

Q And what position?

A Masonry foreman.

Q Where?

A Dallas Toll Building.

Q Have you seen or observed a member of the Respondent Union about the premises of that building during the last month?

A Yes.

Q When is the first time you saw him?

A March --

Q And did you speak to him on that day?

A Yes, Sir.

Q Do you know his name?

A I believe it's Mullins.

Q What was said between you and Mullins?

THE COURT: Mr. Menaker, I think that you have already stated that you do intend -- the Union does intend to picket and apparently that is what the purpose of this witness is.

MR. MENAKER: Your Honor, I believe I could probably stipulate the facts that I believe this man is going to testify.

THE COURT: Yes, I think you can, too, from what you said in the library.

MR. MENAKER: Shall I propose a stipulation?

THE COURT: Yes.

MR. MENAKER: I propose to stipulate that there was a member of our Union at the job site who did not picket at any time, but who had in his possession signs which he would have used to picket, had a truck loaded with McDonald stone appeared. If the truck had been a McDonald Stone truck driven by an employee, he would have picketed with the sign talking about the employees being on strike; had the truck been an independent carrier, he would have picketed with a sign saying

-- protesting the product; that he would not be picketed at any time when the truck was not on the premises; that he would have put up a sign only when the truck came and take it down immediately upon the truck leaving; and that in fact there was no picketing out there.

MR. EVANS: Your Honor, we can join in the stipulation, subject to testimony as to -- we would like to ask Mr. Drake about the wording on the picket sign which he saw that this agent Respondent had with him.

THE COURT: All right.

Q (By Mr. Evans) Mr. Drake, what did the picket sign say that you saw that Mr. Mullins had?

A On the top it said, "McDonald Stone Products" or "McDonald Stone Company" -- I don't remember which, and under that it said, "UNFAIR," and it said, "McDonald does not have a contract with Local 859," and it said, "THIS PICKET IS DESIGNED FOR OR INTENDED FOR McDONALD EMPLOYEES ONLY."

Q Did you see any other signs than that one?

A No, Sir.

MR. EVANS: No further questions.

CROSS EXAMINATION

BY MR. MENAKER:

Q I take it you don't know whether he had more than one sign in his possession or not?

A I don't know where he would hide it in a station

wagon.

Q How about if one sign was on top of another, would you be able to see if one was — what was on the front of each sign?

A I picked the particular sign up.

Q There in the station wagon and examined it?

A I was sitting in the station wagon.

MR. MENAKER: I have nothing further.

MR. EVANS: I have no further questions.

MR. MENAKER: Your Honor, I believe I do have just one more question.

RECROSS EXAMINATION

BY MR. MENAKER:

Q Mr. Drake, did any picketing actually take place out there at any time?

A Not that I saw.

MR. MENAKER: I have nothing further.

THE COURT: All right, you may step down.

(At this time, the witness Drake was excused from the witness stand as stated.)

MR. EVANS: Petitioner calls Mr. James N. Patterson.

JAMES N. PATTERSON, JR.,

the witness heretofore named, having been sworn to testify the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. EVANS:

Q State your name and address, please, Mr. Patterson.

A James N. Patterson, Jr., 1724 Azteca, Fort Worth, Texas.

Q By whom are you employed?

A Thos. S. Byrne, Incorporated.

MR. MINAKER: Your Honor, at this time I will object to any testimony by this witness in connection with the Byrne charge, it being my position it is not properly before this Court, having been settled and therefore they may not reopen.

THE COURT: What is your position on that?

MR. EVANS: Our position is that there is a clear ruling by the Supreme Court of the United States -- it is the Wallace Corporation, 323 U. S. --

THE COURT: You just tell me what your position is.

MR. EVANS: Our position is that the Regional Director did have the authority to set aside this written Settlement Agreement; that the Settlement Agreement provided that the Respondent would not repeat the conduct which it had engaged in in the Thos. S. Byrne and the Citadel Construction Company case, and that these cases have been reopened because Respondent has threatened to engage in that activity in the case you have just heard.

THE COURT: We will hear the evidence and you can

submit your authorities later.

MR. MENAKER: All right, Your Honor.

Q (By Mr. Evans) What is your position with Thos. S. Byrne, please?

A I am president of the company.

Q What business is Thos. S. Byrne in?

A We are general contractors, doing building construction work.

Q What part in the Star Telegram Building construction does Thos. S. Byrne have?

A We are the general contractor.

Q Was this the case on August 6, 1968?

A Right.

(Instrument marked by the reporter as Petitioner's Exhibit No. 3, for identification.)

Q (By Mr. Evans) Mr. Patterson, I hand you this document which has been marked as Petitioner's Exhibit No. 3 and ask you if you can identify it?

A Yes, this is a letter that I received from the Laborers' Local Union on August 6, 1968.

Q Do you know what Local?

A It says "Laborers' Local Union No. 359."

MR. EVANS: Mr. Menaker, will you stipulate that Mr. J. M. Breeding is an agent of the Respondent?

MR. MENAKER: Yes, I sure will.

THE COURT: I don't think the court reporter heard your stipulation.

MR. EVANS: The Petitioner proposes the stipulation that Mr. Jim Breeding is an agent of Respondent under Section 2(13) of the Act.

THE COURT: Do you agree to that?

MR. MENAKER: I so stipulate. Has that been offered yet?

MR. EVANS: We are about to offer it.

We offer this document into evidence.

MR. MENAKER: Your Honor, only for the purposes of preserving my position, I object to it as being irrelevant and immaterial.

THE COURT: I'll overrule the objection.

Q (By Mr. Evans) Had Thos. S. Byrne Construction Company been using McDonald products at the Star Telegram Building at the time you received that letter?

A Yes, Sir.

Q On that day, August 6, 1968, did you have a conversation with Mr. John Wallace of the Laborers' Local 859?

A Yes.

Q Will you tell the Court what was said during that telephone conversation?

A Well, about 11:00 on August 6, I called Mr. John Wallace and when I got him, he said he was just about to call

me, and I said, "Go ahead -- shoot, and tell me what you got on your mind." He said he knew that we had our truck at McDonald's plant to pick up some stone. Actually, it wasn't our truck. He was referring to Bill Scroggins' truck as our truck. He does all our hauling, and it is very common that someone refers to it as our truck, and I agreed with him that that was right; that we were there to pick up some stone, and he said that if we brought that stone on the job that they would put a picket on it, and so I started trying to get him not to put a picket on. I told him that we had had good relations with the Laborers' all these years and so forth and so on and appealed to him on the basis of our good relations -- not to put a picket on, and that didn't do any good, and so I appealed to him on the basis that his letter which I had received that morning, said that their whole purpose was to picket McDonald's employees, and that McDonald's employees would not be on the job site and McDonald's equipment would not be on the job site, and therefore, he shouldn't picket us, and he said that he had been advised that McDonald would sub-contract his hauling and he wasn't falling for any cheap trick like that, and I told him that that was absolutely not true, that I had arranged for this hauling, that Thos. S. Byrne had; that it was an independent trucking contractor, Mr. Bill Scroggins; and that he had been sent to McDonald's yard to pick up the stone; and that didn't seem to do any good; so then

I appealed to him on the basis that we only needed three pieces of stone that day; and that that would finish out our day. We had the crane and equipment and men and so forth there waiting on it. So he finally agreed that if all we were going to do was bring three pieces of stone on the job, that he wouldn't put a picket on at that time. He did say that if we brought in any more stone than three, and he specifically said if we brought on four or five pieces of stone that he would know about it because he had a man in an automobile watching, and if we brought on any more than three pieces, he would put a picket on the job.

Now, that is about the end of the conversation. We didn't make any agreement on anything other than just that one trip.

Q At the time of this conversation with Mr. Wallace, what arrangements had been made for the delivery of the stone to the Star Telegram job site?

A Well, after we got this letter from the Laborers in the morning, I made arrangements with our trucking contractor, Mr. Scroggins, to go to the McDonald plant and pick up the stone.

(Instrument marked by the reporter as Petitioner's Exhibit No. 4, for identification.)

MR. MENAKER: I assume I have a continuing objection, Your Honor?

THE COURT: Yes, you may.

Q (By Mr. Evans) I hand you this document which is marked as Petitioner's Exhibit No. 4 and ask you if you can identify it, please?

A Yes, this is a telegram that we sent to the Laborers' Local Union 859 advising them that we were going to pick up the stone from McDonald's plant; that we were buying it f.o.b. their plant; and that no truck or employee of McDonald would be engaged in the delivery.

MR. EVANS: We offer Petitioner's Exhibit No. 4 into evidence.

MR. MENAKER: Subject to the same objection, Your Honor.

THE COURT: All right.

Q (By Mr. Evans) Excuse me, Mr. Patterson, I noticed that this telegram has "August 5" typed in and "August 6" written in over it. Can you explain that to the Court, please?

A That's just one of those errors that happened in an office. The note I gave the girl didn't have a date on it, and I guess she was just a day off, so she just typed it in.

MR. EVANS: Will you agree to the August 6 date?

MR. MENAKER: I'm not leveling any technical objection to that.

Q (By Mr. Evans) Mr. Patterson, will you describe for the Court the events of the following morning of August 7,

1963?

A On August 7 -- I almost need to say a word about August 6 before I go to August 7.

THE COURT: What is the purpose of this testimony?

MR. EVANS: The purpose of the next question -- of this question -- is to reveal what happened -- the picketing that occurred on the next day, and a conversation between Mr. Patterson and Mr. Wallace.

THE COURT: All right, go ahead.

A (Continuing) I arrived at the job at 8:05 in the morning on August 7 and when I got there, there was a picket on the job by the job entrance, and the men were not working. They were standing around outside the job area on a barricade and on the steps and so forth, and as I came from the parking lot to the job, I heard the men talking about leaving the job, so I asked them to stay, that I was hoping we would get that picket off pretty quick.

So, when I got up in the job office, I issued instructions for the truck, which was Mr. Scroggins' truck -- he was doing the hauling -- I arranged for Mr. Scroggins' truck to leave the job with the stone on it, and as his truck was leaving, I picked up the phone and called for John Wallace and I got him and told him that we were removing the truck, and actually -- well, I told him that the truck actually was gone at that time -- by the time I got him on the phone, the truck

was gone; and I told him that since we had removed the truck with the stone on it, would he now remove the picket, and he said he would, that he was out at 28th Street, and he would be there in ten minutes; and about ten minutes later, he drove up and stopped the car by the picket and they apparently exchanged a few words, and the picket left and was gone by about 8:45.

Q How many employees ceased work during this picketing?

A Approximately 60.

Q Who were they employed by?

A About 40 of them were employed by Thos. S. Byrne and about 20 by General Engineering.

(Instrument marked by the reporter as Petitioner's Exhibit No. 5, for identification.)

THE COURT: I don't understand, Mr. Rhea, why you are bringing up these two cases when a settlement was entered into.

MR. RHEA: The settlement, if the Court please, was entered into, but the parties particularly the Union, has violated that settlement, and it is our consistent practice where they have violated by similar conduct at a later time, to withdraw the settlement, set it aside and proceed on that, if there is a current violation to proceed with.

THE COURT: You are saying, then, that their action with regard to the Bell Telephone is a violation of their agreement, is that what you are saying?

MR. RHEA: That is correct -- the Wallace case -- that we will be glad to present --

THE COURT: I don't see why you need all this testimony. The settlements have been entered into, and if you are right with regard to your contention, then you can open it up again.

MR. RHEA: Well, that is what we are doing.

THE COURT: Well, there is no use in having this man testify.

MR. RHEA: Well, this is a part of the case -- just like the Southwestern Bell building is. At this point, all three cases are being presented to this Court to show violations, to show the pattern of conduct.

THE COURT: All right.

MR. MENAKER: Perhaps I can help, Your Honor.

In the event the Court sees -- agrees that these two cases are properly before the Court and that they are the same case as the Bell case, then we would agree that it would apply, and there is no question but that on two occasions there was a picket -- one for Byrne and one for Citadel, and we don't question that, Your Honor, and I will do what I can -- I will make such stipulation that would speed this up, if Mr. Rhea cares to propose a stipulation.

MR. RHEA: We could stipulate as to the facts that we intend to bring out, and perhaps he could join us with the

facts.

MR. MEYAKER: I'm sure I could as to the facts. I just question the relevancy, and if I preserve my objection, I will be glad to stipulate.

MR. EVANS: Your Honor, I have just one more question of this witness, and that is to identify the content of this picture, and then I believe we can work out a stipulation on the Citadel job site, which is next. So, we will get through with this one quite hastily.

THE COURT: All right, go ahead and ask your question.

Q (By Mr. Evans) Mr. Patterson, I will hand you Petitioner's Exhibit No. 5 and ask you if you can identify the photograph.

A That is a photograph of our job site showing the picket and truck with the stone on it.

Q On that day -- August 7, 1968?

A August 7 -- that's right -- that is the morning we had the picket.

Q Whose truck is that?

A I rented it from Scroggins. Whether he owns it or not, I don't know, but we rented it from Scroggins.

Q Is it a McDonald truck?

A No, Sir, it is not a McDonald truck.

Q Is that McDonald stone on the bed of it?

A Yes, that is McDonald stone.

Q Were there any employees of McDonald Stone or McDonald equipment on the job site at the time that picket walked by?

A No, Sir.

MR. EVANS: We offer Petitioner's Exhibit No. 5 into evidence.

MR. MENAKER: Same objection, Your Honor.

THE COURT: I overrule the objection.

Do you have any questions, Mr. Menaker?

MR. MENAKER: Yes, Your Honor, I have a few.

THE COURT: All right, go ahead.

CROSS EXAMINATION

BY MR. MENAKER:

Q Sir, is it true that McDonald Stone Corporation Company normally delivers to the job site?

A That's right.

Q And you have had a history of buying from this particular corporation that goes back at least a year?

A Yes.

Q Normally they make the delivery and an exception was made in this particular case, is that right?

A Right.

Q And would the same thing be true with regard to you as has already been testified to, that the delivery cost was deducted from the usual price of the stone, which is normally delivered by McDonald Stone to the job site?

A That's right.

MR. MENAKER: I have nothing further, Your Honor.

THE COURT: All right, you may step down.

(The witness Patterson was thereupon excused from the witness stand as stated.)

MR. MENAKER: Has that Exhibit been offered?

MR. RHEA: Not yet.

MR. MENAKER: Well, offer it, and subject to my reservation, I'm sure we can stipulate the facts, Mr. Rhea.

MR. EVANS: We offer to stipulate that on December 27, 1968, Respondent picketed Citadel's construction site at the North Texas State University at Denton, Texas, where Citadel was using McDonald products, but at a time when no McDonald employees or equipment were at that construction site; and that an independent hauler by the name of Ben Loper delivered the stone to the job site.

MR. MENAKER: We are prepared to stipulate, if he will add to that that we picketed only at the time that the truck containing the identifiable product of McDonald Stone was on the job site and at no other time.

THE COURT: Do you also wish to stipulate as to the cost?

MR. MENAKER: The same basis, Your Honor, yes -- that the price was the same as these other two arrangements.

THE COURT: In other words, that the cost of

transportation was deducted from the price of the stone?

MR. MENAKER: Yes, Your Honor.

MR. EVANS: That is true, and that Citadel made the arrangements with Ben Loper.

MR. MENAKER: And with that I will so stipulate.

MR. EVANS: And that there was a cessation of work by approximately 40 employees when that picket sign went up and these were employees of Citadel.

MR. MENAKER: It is so stipulated.

MR. EVANS: I have nothing further, Your Honor.

THE COURT: Mr. Menaker?

MR. MENAKER: Nothing further, Your Honor. We have no evidence we wish to put on at this time.

THE COURT: Do you want to furnish me with some authorities and let's take it under advisement for a few days?

MR. MENAKER: Your Honor, I have brought some authority, but the evidence does establish an ally situation, and I do wish sometime to furnish you a brief on that point, if I may.

THE COURT: All right.

MR. RHEA: We have no objection to furnishing authorities.

THE COURT: And please make it short -- there is only one point involved, as I see it, from the evidence.

MR. RHEA: That's right.

THE COURT: Do you want to submit a brief — I understood your statement to be that you would like to brief that and submit it later, am I correct?

MR. MENAKER: Yes.

MR. RHEA: We have no objection to that if this Order that we now have outstanding can remain.

THE COURT: I will continue the restraining Order until I decide the case, but it will be in a few days.

MR. RHEA: All right, we will then submit a brief covering this area.

MR. EVANS: We would like to request permission to withdraw our Exhibits for the purpose of substituting copies.

THE COURT: Well, aren't these copies?

MR. EVANS: Yes, Your Honor, those are, but this is an original photograph, and there is an original telegram and we would like to withdraw those.

THE COURT: All right, you may.

That's all at this time.

(Subsequent to the hearing, Counsel Rhea and Counsel Menaker consulted with the Court in the Court's chambers, after which both attorneys returned to the courtroom and the following statement was made:

MR. RHEA: The Court said that Friday would be an acceptable time for the briefs, and we would like you to note this in the record.

MR. MENAKER: That's right.)

(THESE PROCEEDINGS CONCLUDED AT THIS TIME.)

CERTIFICATION

I, ODELL OLIVER, certify that during the hearing proceedings hereinbefore shown of the foregoing styled and numbered cause, I was the official shorthand reporter and took in shorthand such proceedings, and have had the same transcribed under my supervision as shown by the above and foregoing 37 pages, and that said transcript is true and correct.

This the 10th day of April, 1969.

ODELL OLIVER, U. S. DISTRICT COURT REPORTER FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

TX2

Thomas S. Byrne Inc.
Fort Worth National Bank Bldg.
Fort Worth, Texas

Lithonia Local Union No. 150 is an [illegible]
Byrne Products, Inc.

The [illegible] upon a small portion of
[illegible] plant, most of your working day being
[illegible]. In order to [illegible] the success of
[illegible] to McDonald's employees it is [illegible]
[illegible] our picket sign where the employees work
[illegible], therefore, it may [illegible] McDonald's [illegible]
[illegible] on your premises.

However, this picketing is directed to the employees of McDonald only and not to your employer. In view of [illegible] request permission to work upon your property so as to [illegible] as close to the McDonald premises as possible. If this permission is denied, we will, of course, be required to picket at [illegible] possible, which would be just outside the entrance to your property.

Any picketing in which we engage will be for the purpose of obtaining a collective bargaining agreement from McDonald's and will be for no other purpose. It will be conducted in accordance with [illegible] and will be limited to [illegible] as permitted by the law.

If our picketing or other activity has only secondary effect rather than that of securing a reasonable collective bargaining agreement with McDonald, and if you will call this effect to our attention, we will take such appropriate steps as are available to us to limit such effect without, however, abandoning our efforts of publicization and picketing as guaranteed by the law.

In the event that picketing of McDonald takes place in the vicinity of your place of business, we request that it be conducted in a manner consistent with the ordinances for orderly conduct[illegible] [illegible] in the [illegible] of a group of [illegible] by [illegible] Body Shop Co., 92 NLRB 547, 27 LRRM 1281.

Very truly yours,

[illegible]

NATIONAL LABOR RELATIONS BOARD
Docket No. 2/-CC-3[illegible] Official Exhibit No. Trial Examiner 2
Disposition: Identified ✓ Received ✓ Rejected
In the matter of [illegible] AFL-CIO, Local 251
Date April 1962 Witness — Reporter
No. Pages 1

JA-157

WESTERN UNION

TELEGRAM

W. P. MARSHALL, PRESIDENT

PATRON OF SVC	PD OR COLL.	CASH NO.	CHARGE TO THE ACCOUNT OF	TIME FILED
			THOS. S. BYRNE, INC.	

The following message, subject to the terms on back hereof, which are hereby agreed to

August 6 1960

J. M. Breeding
Brers' Local Union 859
Durnet
Worth, Texas

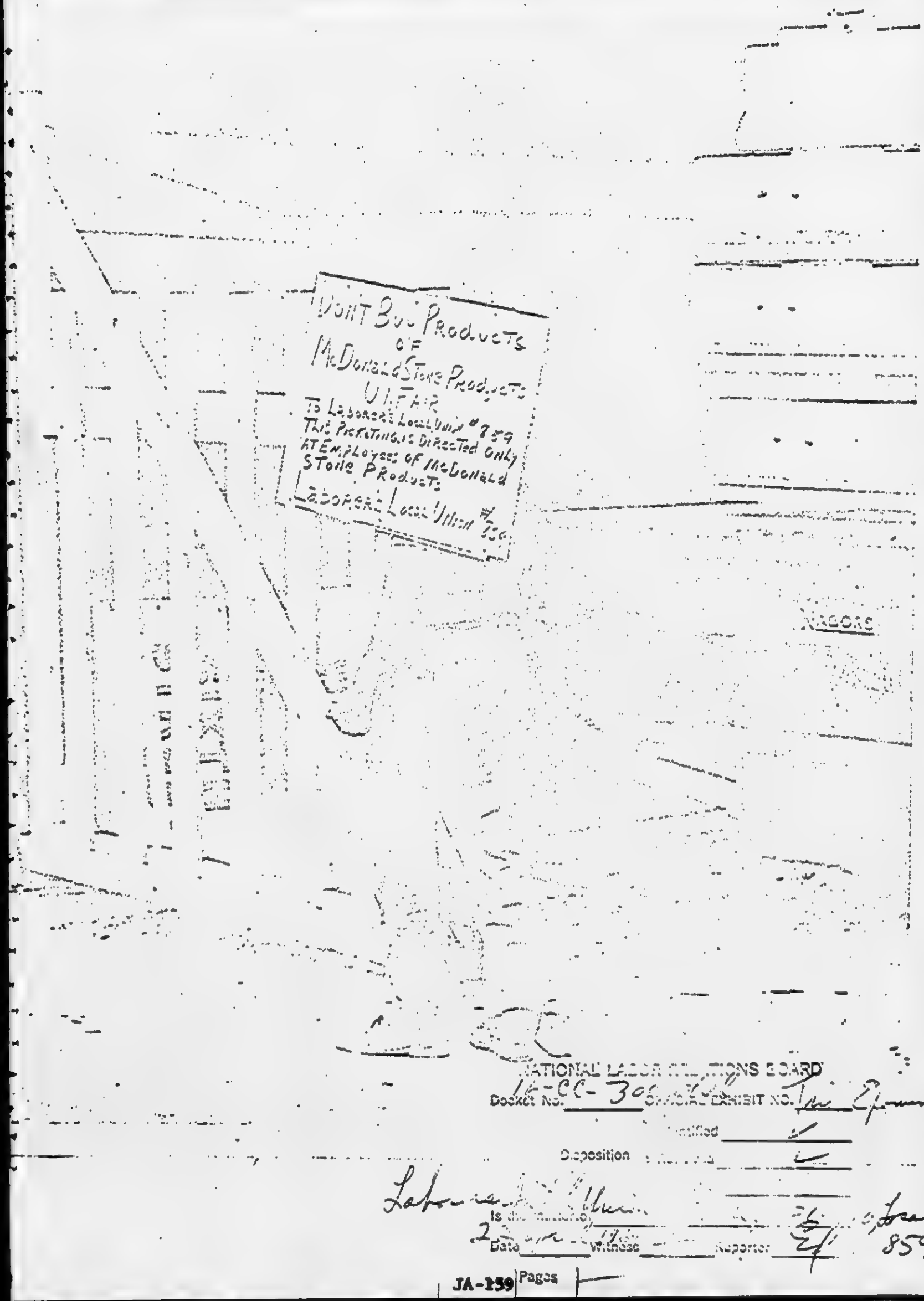
Response to your letter of August 5, 1960, this is to advise you that effective
ust 6, 1960, and until further notice Thos. S. Byrne, Inc. will purchase products
McDonald-Stone Products, Inc., J.O.D. McDonald plant. No truck, employee
ub-contractor of McDonald will be engaged in the delivery of products purchased
hos. S. Byrne, Inc. to our job sites.

James N. Patterson, Jr., President
THOS. S. BYRNE, INC.

GX-4

NATIONAL LABOR RELATIONS BOARD
Docket No. 16-C Consolidated No. 1-lE Exhibit 3

Date Received
Disposition Identified
Reporter
Labor Org. Involved 14 Union, AFL-CIO; Local 85
Date
No.



NATIONAL LABOR RELATIONS BOARD
Docket No. 14-CC-30[illegible] General Exhibit No. [illegible]
Identified
Disposition
Is the witness
Date Witness Reporter
Labor Union
2 Total
859

JA-259 Pages

-8

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C.

Howard Jenkins, Jr

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 859, AFL-CIO

and

THOMAS S. BYRNE, INC.,

Case No. 16-CC-300

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 859, AFL-CIO

and

THE CITADEL CONSTRUCTION COMPANY, INC.

Case 16-CC-315

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 859, AFL-CIO

and

DEE BROWN MASONRY, INC.

Case 16-CC-327

RESPONDENTS' EXCEPTIONS TO THE TRIAL EXAMINERS DECISION

Comes now LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 859, AFL-CIO and files this, their objections to the decision of the Trial Examiner, dated July 22, 1969. The Respondent objects to the finding made in footnote Number 5 on page 5 of the decision, beginning at line 53; for the reason that the statements contained therein and the cases cited are not authoratitive and that the Regional Director did not have the authority to set aside other prior settlement agreements where the Respondent has not violated the settlement agreements purportedly set aside.

Respondent specially excepts to the findings by the Trial Examiner on Page 8, line 15 through 18, for the reason that same is an incorrect conclusion of the law.

Respondent specially excepts and objects to the findings of the trial examiner on Page 8 at lines 3 through 20 for the reason that the arrangements made by the charging parties, and particularly Dee Brown Masonry, Inc., did make

them allies of McDonald, and that the Trial Examiner's findings of fact and conclusions of law therein are erroneous.

Respondent specially excepts to the findings of fact and conclusions of law of the Trial Examiner on Page 8 at lines 24 through 36 for the reason that the job site was a "common situs".

Respondent specially excepts to the findings of the Trial Examiner at page 9 at line 2 through 6 for the reason that in Case No. 16-CC-327, there was no work stoppage and no threats made.

Respondent specially excepts to the findings of the Trial Examiner's conclusions beginning at line 11 through 16 of page 9 for the reason that it has not been proved nor even alleged that the Respondent violated the settlement agreements as to 16-CC-300 or 16-CC-315 as to Gruber Byrne or Citadel and that therefore the vague phrase "or any other employer or person" is so vague and indefinite as to not be the proper basis for seeking voids a settlement agreement entered into in good faith and honored by the Respondent herein.

Respectfully submitted,

Marvin Menaker
Attorney for Respondent

BRIEF FOR PETITIONER

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24098

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 859, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Petition for Review and on Cross-Application for Enforcement of an Order of the National Labor Relations Board

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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TABLE OF AUTHORITIES CITED

Index of Cases

* Cases chiefly relied upon are marked with an asterisk.

OTHER AUTHORITIES

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IN THE

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No. 24098

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 859, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Petition for Review and on Cross-Application for Enforcement of an Order of the National Labor Relations Board

---

BRIEF FOR PETITIONER

ISSUE PRESENTED FOR REVIEW

Did an agreement between a struck supplier of stone and its customers which provided that during the strike the customers would hire independent haulers, at the supplier's expense, for the purpose of making deliveries normally made by the supplier's striking employees, render the customers the "allies" of the struck supplier for the pur-

poses of the "struck-work ally" exemption from §§ 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended?[1]

This case has not previously been before this court.

REFERENCE TO RULING

The Decision and Order of the National Labor Relations Board as to which review is sought herein, was issued on December 18, 1969, and is reported at 180 NLRB No. 51 (A. 1-15).[2]

STATEMENT OF THE CASE

A. Nature of the Case

This is an action under § 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(f), to review and set aside a final Order of the National Labor Relations Board ("Board" hereinafter) which held that petitioner Local 859 ("Union" hereinafter) violated §§ 8(b)(4)(i) and (ii)(B) of the Act in connection with a primary economic strike against McDonald Stone Products Company,

---

1 29 U.S.C. § 158(b)(4)(i)(ii)(B), which provides in pertinent part as follows:

> It shall be an unfair labor practice for a labor organization or its agents . . . (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

2 References to the Appendix have been designated as "(A. —)."

Inc. ("McDonald" hereinafter), a manufacturer and distributor of stone products, by threatening to picket and/or picketing three customers of McDonald. The Board ordered the Union to cease and desist from such conduct and take certain affirmative action (A. 4, 13-4).

The Board has filed a cross-application herein for enforcement of its Order.

B. The Course of Proceedings

On August 7, 1968, Thomas R. Byrne, Inc. ("Byrne" hereinafter), filed an unfair labor practice charge against the Union with the Sixteenth Regional Office of the Board, alleging that the Union was inducing or encouraging employees of Byrne to engage in a strike and that the Union had threatened, coerced, or restrained Byrne, all with the object of forcing or requiring Byrne to cease doing business with McDonald in violation of §§ 8(b)(4)(i) and (ii)(B) of the Act (A. 16). On August 19, 1968, the Union entered into an informal settlement agreement, which was approved by the Board's Regional Director, regarding the foregoing charge. It provided that its execution by the Union was "not to be construed as an admission of a violation of the Act" (A. 38).

On January 2, 1969, the Citadel Construction Company, Inc. ("Citadel" hereinafter), filed an unfair labor practice charge against the Union alleging a similar violation of the Act in connection with Citadel's business relationship with McDonald (A. 18). Later in January, a similar informal settlement agreement containing a "non-admission" clause was entered into by the Union with regard to Citadel's charge and was approved by the Regional Director (A. 40).

On March 13, 17 and 19, 1969, a charge and two amended charges were filed against the Union by Dee Brown Masonry, Inc. ("Brown" hereinafter), alleging similar violations of the Act in connection with Brown's business relationship with McDonald (A. 20, 22, 24). On the basis of the

results of an investigation of Brown's charge, the Board's Regional Director set aside the settlement agreements entered into with respect to the charges filed by Byrne and Citadel. In addition, on March 28, 1969, the Regional Director issued a consolidated complaint and notice of hearing in all three cases (A. 27-34).

On March 25, 1969, pursuant to § 10(l) of the Act, the Regional Director sought and obtained a temporary restraining order against the Union in the United States District Court for the Northern District of Texas, Dallas Division (A. 85). On March 31, 1969, pursuant to § 10(l) of the Act, a hearing was conducted before the Honorable Sarah T. Hughes, United States District Judge, on the Regional Director's application for a temporary injunction (A. 61). On April 30, 1969, Judge Hughes rendered her decision denying the Regional Director's motion for temporary injunction and dissolving the temporary restraining order. *Davis* v. *Laborers' International Union of North America, Local 859, AFL-CIO*, C.A. 3-3072-B (unreported).

On April 22, 1969, a hearing was conducted on the Regional Director's complaint before A. Bruce Hunt, Esq., Trial Examiner (A. 44-5). On July 22, 1969, Trial Examiner Hunt rendered his Decision, finding that the Union had engaged in certain of the alleged unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action (A. 5-15). The Union thereafter filed exceptions to the Trial Examiner's Decision with the Board (A. 160-1). On December 18, 1969, the Board rendered its Decision and Order affirming the Trial Examiner's Decision (A. 1-4).

C. Statement of Facts

McDonald maintains its offices and places of business in Ft. Worth. In the normal course of its business, McDonald produces and delivers stone and other building materials to its customers who are engaged in the construction industry (A. 6-9).

The Union is a labor organization which is the exclusive collective bargaining representative of McDonald's production and maintenance employees, including its truck drivers. It was so certified by the Board on November 6, 1967, pursuant to a representation election. Subsequent to the Union's certification, its protracted efforts at negotiating with McDonald proved unsuccessful, and during July or August 1968, in support of its bargaining demands it commenced an economic strike which continued up until the hearing. It also commenced picketing both of McDonald's plants in Ft. Worth. Pursuant to a petition filed by McDonald during the course of the economic strike questioning the Union's continued majority status, the Union was again selected by McDonald's employees as their exclusive bargaining representative, and on April 21, 1969, it was again certified by the Board (A. 6,56-7,95,128).

1. Events Involving Byrne

Byrne is a Texas corporation engaged as a construction contractor with its principal office at Ft. Worth (A. 26,33). During August 1968, Byrne was the general contractor on a "Star-Telegram" construction project in Ft. Worth (A. 142). Approximately sixty employees of Byrne were at work on the project (A. 89). Byrne had an agreement which provided for the supply and delivery of stone to the project by McDonald (A. 151).

On August 6, 1968, Byrne received a letter from the Union which advised of its strike against McDonald. The letter also set forth petitioner's intention to engage in so-called "roving-situs" or "ambulatory" picketing of McDonald's trucks while they were making deliveries to customers of McDonald, including Byrne. The letter further provided that

> . . . this picketing is directed to the employees of McDonald *only* and not to your employees. In view of this fact, we request permission to come upon your property so as to picket as close to the McDonald

drivers as possible. If this permission is denied, we will, of course, be required to picket as close as possible, which would be just outside the entrance to your property.

Any picketing in which we engage will be for the sole purpose of obtaining a collective bargaining agreement from McDonald. The picketing will be for no other purpose; we seek no action other than compliance by McDonald with reasonable union demands.

If our picketing or other activity has any incidental effect other than that of securing a reasonable collective bargaining agreement with McDonald, and if you will call this effect to our attention, we will take such appropriate steps as are available to us to limit such effect without, however, abandoning our rights of publication and picketing as guaranteed by the law.

In the event that any picketing of McDonald takes place in the vicinity of your place of business, be assured that it will be conducted in strict conformity with the standards for primary ambulatory picketing set forth by the NLRB in a series of cases beginning with *Moore Dry Dock Co.*, 92 NLRB 547, 27 LRRM 1108 (A. 142, 157).

Subsequent to the receipt of this letter, James N. Patterson, president of Byrne, arranged for Scroggins, an independent trucking contractor, to deliver the stone from McDonald's plant to Byrne's project, with Byrne and McDonald agreeing that the price of the stone to be hauled by Scroggins would be McDonald's usual price minus Scroggins' hauling charges (A. 145, 151-2).

Pursuant to this arrangement, on August 6, 1969, Scroggins went to McDonald's plant to pick up stone destined for Byrne. Patterson called John Wallace, an agent of the Union, who told Patterson that he was just "about to call" him. Patterson asked Wallace what he had in mind, and Wallace said that Byrne's truck was at McDonald's plant to pick up some stone, and if the stone were to be brought to the "Star-Telegram" project, picketing would ensue.

Patterson told Wallace that only three pieces of stone were necessary to complete the day's work, and he asked Wallace to refrain from picketing. Wallace agreed, and the three pieces of stone were delivered without incident (A. 143-8).

On August 6, 1968, Adams (Byrne's superintendent on the project) talked with O'Neal (the Union's business manager). O'Neal advised Adams that "if you bring any more of McDonald's stone on the job, we are going to have to picket" (A. 89-90). On August 7th, Scroggins delivered a load of McDonald stone to the project (A. 95,150). A single picket commenced patrolling as closely as possible to Scroggins' truck. The picket made no appeals to the employees of Byrne (A. 95). Approximately forty employees of Byrne and twenty of another contractor ceased work. Scroggins' truck was not unloaded, and Patterson instructed someone to tell the driver to leave. Patterson phoned Wallace and told him that the truck had left the project. Wallace immediately went to the project and terminated the picketing. The employees then returned to work (A. 102-3,147-8).

2. Events Involving Citadel

Citadel is a Texas corporation engaged as a construction contractor. Citadel's principal office is in San Marcos (A. 26-7,33). In December 1968, Citadel was engaged in the construction of a dormitory at North Texas State University at Denton, Texas (A. 152).

Citadel had an arrangement with McDonald, similar to Byrne's, which provided for the supply and delivery of stone by McDonald. In the face of the strike by McDonald's employees, Citadel arranged for Loper, an independent hauler, to pick up the stone at McDonald's plant and deliver it to the dormitory job site, with Citadel and McDonald agreeing that McDonald would deduct Loper's charges from the usual price of the stone. On December

27, 1968, pursuant to this arrangement, Loper proceeded to deliver a load of stone to Citadel's job site (A. 114, 152-3). Two pickets arrived a few minutes after the arrival of Loper's truck. As soon as the truck had been unloaded and left the job site, the pickets departed. The pickets had no conversation with any employee of Citadel (A. 111-2). There were approximately 120 Citadel employees on the job, and approximately 40 to 60 stopped work during the picketing (A. 108,114,153).

3. Events Involving Brown

Brown is a Texas corporation engaged as a construction contractor. Its principal office is in Dallas (A. 26-7,33). In March 1969, Brown was performing a masonry subcontract on a project in Dallas for the Southwestern Bell Telephone Company. Brown had a $115,000 contract with McDonald calling for the supply and delivery by McDonald of stone to the Bell project (A 130-4). For several days beginning on March 3, 1969, Mullins, a striking employee who ordinarily made deliveries for McDonald, sat in a station wagon across the street from the Bell project. He did not picket (A. 75-82, 137-9).

On March 12, 1969, C. Dewitt Brown, Jr., owner of Brown, called Vinall, an agent of the Union, to say that Brown was "about ready to have stone delivered" to the project. Brown advised Vinall that he had arranged to buy the stone f.o.b. McDonald's plant, and that an independent hauler—rather than McDonald—would pick up and deliver the stone. Brown asked if the Union would picket, and Vinall replied that the Union was "going to picket the stone whenever and wherever the opportunity presented itself." Brown told Vinall that he would "take whatever action that was available . . . under law to get the stone delivered." Vinall replied, "I understand that you have to do what you have to do and I have to do what I have to do" (A. 130-2).

The actual agreement between Brown and McDonald, rather than providing for the purchase of the stone f.o.b. McDonald's plant, provided that during the strike Brown would pay the contract price less the amount Brown was charged by the independent hauler to pick up and deliver the stone (A. 10).

On March 13, 1969, Drake (Brown's foreman on the Bell project) saw Mullins across the street in the station wagon and went over to converse with him. Drake asked Mullins if the Union was "going to picket the job." Mullins replied in the negative, adding that he would engage in "picketing of the stone truck or the stone if it arrived on the job" (A. 78-80). No picketing of Brown took place (A. 29).

SUMMARY OF ARGUMENT

The instant case is controlled by *NLRB* v. *Business Machine, Local 459, (Royal Typewriter Co.)*, 228 F.2d 553 (2nd Cir. 1955), *cert. denied*, 351 U.S. 962 (1956). In *Business Machine*, Royal advised its customers, to whom it owed a contractual obligation to repair their typewriters, that while Royal's repairmen were on strike the customers should have independent companies repair their machines, and that the customers would be reimbursed by Royal for the independents' charges. The customers followed Royal's instructions, except that they sent the independents' unpaid bills to Royal, which paid the independents directly. The striking union picketed four of the independents.

The Board held that picketing of the independents violated § 8(b)(4)(A) of the Act [presently § 8(b)(4)(i)(ii)(B)]. But the Second Circuit reversed, holding that "the independent repair companies were so allied with Royal that the Union's picketing of their premises was not prohibited by § 8(b)(4)(A)" 228 F.2d 553, 557. The court reasoned that employers who perform work during a strike which is normally performed by the struck employer's

employees, pursuant to an arrangement with the struck employer, are subject to picketing by the striking union since they have allied themselves with the struck employer. The Second Circuit emphasized that "[t]he result must be the same whether or not the [struck] primary employer makes any direct arrangement with the employers providing the services" 228 F.2d 553, 558-9.

In the instant case, McDonald, who was contractually obligated to deliver its stone to its customers (Byrne, Citadel and Brown), was unable to maintain its normal delivery operation during its strike. Hence, it "farmed-out" its deliveries to its customers and their agents who in turn were aware that they were performing work which, but for the strike, would have been performed by McDonald's employees. Therefore, the Union herein was equally justified in picketing the "allies" to induce them to cease performing struck-work.

The sole factual differences between this case and *Business Machine* arise out of (1) the manner in which the "arrangement" came into existence, and (2) the method by which performance of the struck-work was compensated for. As to the latter, the independent haulers herein were paid directly by Byrne, Citadel and Brown, who were reimbursed by McDonald; whereas in *Business Machine,* the independents were paid directly by Royal. But insofar as the ally doctrine is concerned, the foregoing difference is insignificant, since in both cases the real cost for the struck-work was borne by the struck primaries pursuant to arrangements with their customers. Further, as to the manner in which the arrangement arose, it is clear that McDonald ratified, benefited from, and paid for the performance of the struck-work. Hence, whether or not McDonald "devised" the arrangement is also without legal significance.

The legislative histories of the Labor-Management Relations Act of 1947, 61 Stat. 136, and the Labor-Manage-

ment Reporting and Disclosure Act of 1959, 73 Stat. 519, in which the provisions of § 8(b)(4) of the Act were first adopted and thereafter amended, support petitioner's position that the instant case falls within the ally doctrine. For Congress, in enacting these statutes, did not intend to insulate from secondary pressures employers who arranged with struck employers for the performance of struck-work. Indeed, in 1959, Congress expressly rejected a proposed amendment to § 8(b)(4) which would have narrowed the scope of the ally doctrine and overruled *Business Machine.*

In *National Woodwork Mfrs Ass'n* v. *NLRB*, 386 U.S. 612 (1967), the Supreme Court approved the ally doctrine as it should be applied in the instant case. And in the instant case, the Board was denied the preliminary injunction which it sought under § 10(l) of the Act on the ground that the customers of McDonald had so allied themselves with McDonald as to have lost their status as neutrals.

The Board's failure to have correctly applied the ally doctrine herein is attributable to its erroneous effort to distinguish deliveries from other types of struck-work. Hence, the Trial Examiner concluded that a customer is always free to send its own trucks to pick up goods from its supplier, and therefore to hire an independent hauler to do so does not make the customer the ally of a struck supplier.

But this view disregards the fact that deliveries—no less than production work—constitute unit work which employees have the right to protect from erosion or transfer outside of their bargaining unit. "Activity and agreement which directly protect fairly claimable jobs are primary under the Act. Incidental secondary effects of such activity and agreement do not render them illegal" *Meat and Highway Drivers* v. *NLRB (Wilson and Co.)*, 118 U.S. App.D.C. 287, 355 F.2d 709, 713-4 (1964). Therefore, picketing of an employer who has undertaken to perform bargaining unit work during a strike does not violate §§ 8(b)

(4)(i) and (ii)(B) since such conduct is fundamentally "work preserving" and therefore primary in nature.

In the instant case, by introducing independent haulers into the situation, McDonald's customers also sought to insulate themselves from the possible secondary radiations which might have befallen them if the independent haulers had been engaged by McDonald. For under those circumstances, the Union could have lawfully engaged in "truck-following"and "roving-situs" picketing of the independents in accordance with the Board's *Moore Dry Dock* standards. And any resulting stoppages among the customers' employees would not have rendered such picketing unlawful so long as the *Moore Dry Dock* standards were observed. Hence, the "arrangement" herein may be seen as a thinly-veiled stratagem to avoid this possibility.

In *Carpet Layers Local 419* v. *NLRB*, — U.S.App.D.C. —, — F.2d —, 74 LRRM 2444 (June 12, 1970), this court recently remanded a decision to the Board in which it had found picketing of Sears to be unlawful in connection with a union's dispute with independent contractors who perform carpet and floor covering installation pursuant to an agreement with Sears. This court reasoned that Sears was an ally of the struck installers since "an important economic interest of Sears in the dispute of the union is that to the extent Sears' carpeting is installed by non-unionized workers willing to perform services on an assigned, piecework basis instead of an hourly rate, Sears may gain a competitive advantage in the carpeting market . . . ." And therefore, "Sears does not appear to be a neutral in an economic sense." But in the instant case, McDonald's customers were similarly interested in the settlement to be arrived at by McDonald and the Union since it would ultimately be reflected in the price McDonald would charge them for the delivery of its stone. And unlike *Carpet Layers,* in which Sears made no effort to aid the struck installers, here McDonald's customers took direct steps to help break the strike by continuing McDonald's delivery operations.

Accordingly, the conclusion is inescapable that Byrne, Citadel and Brown became McDonald's allies and waived their neutral status, thus subjecting themselves to the Union's lawful economic pressures.

ARGUMENT

The Union's Threats of Picketing and Picketing Did Not Violate § 8(b)(4)(i)(ii)(B) of the Act Under the Struck-Work Ally Doctrine

Petitioner submits that *NLRB* v. *Business Machine, Local 459, (Royal Typewriter Co.)*, 228 F.2d 553 (2nd Cir. 1955), *cert. denied,* 351 U.S. 962 (1956), governs the instant case and that it fully supports petitioner's position that its threats of picketing and its picketing did not violate §§ 8 (b)(4)(i) or (ii)(B) of the Act, under the "struck-work ally" doctrine.

That *Business Machine* is controlling is demonstrated first by the almost indistinguishable factual situations present in both cases. *Business Machine* arose out of a labor dispute between the Royal Typewriter Company and the union representing its mechanics and other service personnel. On being unable to reach agreement in bargaining with Royal over a new contract, the union struck. Royal was party to several types of service contracts pursuant to which it was obligated to repair its customers' typewriters at their premises.

Royal advised its service contract customers that during the strike they should select an independent repair company from the telephone directory, "have the repair made, and . . . send a receipted invoice to Royal for reimbursement for reasonable repairs within their agreement with Royal" 228 F.2d 553, 555-6. Consequently, many of Royal's customers had repair services performed by various independents. In most instances, however, contrary to Royal's instructions the customers sent the unpaid repair bills to Royal, and it paid the independents directly.

During May 1954, the union picketed four of the independents which had been doing repair work for Royal's customers. With respect to the lack of any direct connection between the independents and Royal, the Trial Examiner in *Business Machine* observed that

> when called by an owner to service a typewriter, a mechanic generally cannot know, unless he is specifically told, whether another company is obligated to service the machine. Nor, even if he knows it, can he be deemed to be entering into a contract with the obligor when he undertakes to service the machine at the request of the obligee. Whatever legal relationships are established in such a situation, they are between the owner and the independent, not between the independent and Royal [*Royal Typewriter Co.*, 111 NLRB 317 (1955)].

And while the Board held—just as it did in the instant case—that the union's picketing of the independents was unlawful under § 8(b)(4)(A), the Second Circuit reversed, concluding that "[t]he independent repair companies were so allied with Royal that the Union's picketing of their premises was not prohibited by § 8(b)(4)(A)" 228 F.2d 553, 557.[3] In so doing, the Second Circuit declared that it is not the nature of the *legal*, but rather, the *economic* relationship which is of critical significance in applying the ally doctrine:

> Where an employer is attempting to avoid the economic impact of a strike by securing the services of others to do his work, the striking union obviously has a great interest, and we think a proper interest, in preventing those services from being rendered. This interest is more fundamental than the interest in bringing pressure on customers of the primary employer.

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[3] The Second Circuit found that ". . . there was evidence of only one instance where Royal contacted an independent . . . to see whether it could handle some of Royal's calls. Apart from that incident there is no evidence that Royal made *any* arrangement with an independent directly" (emphasis added) (228 F.2d 553, 558).

> Nor are those who render such services completely uninvolved in the primary strike. By doing the work of the primary employer they secure benefits themselves at the same time that they aid the primary employer. The ally employer may easily extricate himself from the dispute and insulate himself from picketing by refusing to do that work . . . . The existence of the strike, the receipt of checks from Royal, and the picketing itself certainly put the independents on notice that some of the work they were doing might be work farmed-out by Royal. Wherever they worked on new Royal machines they were probably aware that such machines were covered by a Royal warranty. But in any event, before working on a Royal machine they could have inquired of the customer whether it was covered by a Royal contract and refused to work on it if it was. There is no indication that they made any effort to avoid doing Royal's work. The Union was justified in picketing them in order to induce them to make such an effort. We therefore hold that an employer is not within the protection of § 8(b)(4)(A) when he knowingly does work which would otherwise be done by the striking employees of the primary employer and where this work is paid for by the primary employer pursuant to an arrangement devised and originated by him to enable him to meet his contractual obligations. *The result must be the same whether or not the primary employer makes any direct arrangement with the employers providing the services* (emphasis added) (228 F.2d 553, 558-9).

Similarly, in the instant case, McDonald, who was contractually bound to deliver stone to its customers, was unable to maintain its normal delivery operation during the strike. Hence, it "farmed-out" its deliveries to its customers and their agents who in turn knew they were performing work which but for the strike would have been performed by McDonald's employees. Therefore, the Union herein was equally justified in picketing the "allies" to induce them to cease performing such struck-work. Moreover, as in *Business Machine*, the fact that McDonald had no "direct" arrangement with the independent haulers

hired by its customers is of no significance since it is undisputed that "McDonald bore the expenses of delivery" (A. 11), by these independent haulers.

The sole factual differences between the instant case and *Business Machine* arise out of (1) the manner in which the "arrangement" came into existence, and (2) the method by which the performance of the struck-work was compensated for by the struck primary. As to the latter, while the independent haulers were paid directly by Byrne, Citadel and Brown, the customers in turn were reimbursed by McDonald for their hauling expenses; whereas in *Business Machine,* the independent repairmen were paid directly by Royal. But insofar as the application of the ally doctrine is concerned, the foregoing difference does not represent a basis for distinguishing the cases. For McDonald's agreement to reimburse its customers for their exact hauling costs during the strike was the same as the commitment Royal made to its customers. Hence, the fact that Royal's customers chose to send the bills they received from the independents to Royal for payment, whereas here McDonald's customers paid the bills themselves and were later reimbursed by McDonald, is legally irrelevant. What is of controlling significance is that in both cases the real cost for the struck-work performed by the independents was borne by the struck primaries pursuant to arrangements with their customers.[4]

Further, as to the manner in which the arrangement arose, it is clear that McDonald ratified, benefited from, and paid the cost of the performance of the struck-work by the independents. Hence, whether or not McDonald "devised" the arrangement is similarly without legal significance.

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[4] What actually accounts for the factual distinction is that Royal's customers had paid for their repair services in advance so that they became entitled to a refund for services not performed by Royal during the strike. But in this case, McDonald's customers had not yet paid for the stone, so that they had a debt owing to McDonald from which the hauling charges of the independents could be deducted.

It was in precisely such situations that Senator Taft, a principal architect of the secondary boycott provisions, indicated that they would not be applicable:

> The secondary boycott ban is merely intended to prevent a union from injuring a third person who is *not involved in any way* in the dispute or a strike . . . . It is not intended to apply to a case where the third person is, in effect, in cahoots with or acting as part of the primary employer (emphasis added) (95 Cong. Rec. 8709).

And this policy of withdrawing the protections of § 8(b)(4) from employers who give aid and comfort to struck employers was preserved intact by Congress in enacting the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, notwithstanding an effort in the House to severely restrict it. Hence, H.R. 8400, the original Landrum Bill, would have narrowed the ally doctrine to situations in which the "ally" was defined as a "person who has contracted or agreed with an employer to perform for such employer work which he is unable to perform because his employees are engaged in a strike . . . " 80th Cong., 1st Sess. § 705(a), in I National Labor Relations Board, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 680-2.[5] But this provision was opposed by both Senate and House conferees. Thus, a memorandum prepared by then-Senator Kennedy of Massachusetts and Congressman Thompson of New Jersey, declared as follows with regard to the impact of the House proposal upon the Second Circuit's decision in *Business Machine* and existing law:

> The Court of Appeals for the Second Circuit held that this was not a secondary boycott. The independent was not a neutral, the court said. Since Royal was asking the independent to help Royal break the strike by performing Royal's contracts for Royal's

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[5] "Leg. Hist." hereinafter.

> account, it was only fair to allow the union to ask the independent's employees to help the union win by refusing to do the strikers' work. *The court ruled that it was immaterial that there was no contract or agreement between Royal and the independent. NLRB* v. *Business Machines and Office Appliance Mechanics,* 228 F. 2d 553 (2d Cir. 1955).
>
> The House bill denies unions this privilege in some situations because, like [sic] the court decision, it is confined to cases in which the independent undertakes to do the work by contract or agreement with the struck employers.
>
> The best method of correcting this weakness is simply to strike out the proposed proviso and leave the matter to the courts (emphasis added) (105 Cong. Rec. 15222-3, II Leg. Hist. 1708-9).

The House-Senate conferees agreed with this appraisal and deleted the foregoing provision from the final version of the Bill "because the committee of conference did not wish to change the existing law as illustrated by . . . *Business Machine* . . . " H.R. Rep. No. 1147, 89 Cong., 1st Sess. 38, I Leg. Hist. 942 (Conference Report). Thus, the 1959 amendments to § 8(b)(4), which included §§ 8(b)(4)(i) and (ii)(B), were specifically intended to leave the Second Circuit's decision in *Business Machine* undisturbed.[6]

The Supreme Court itself, in *National Woodwork Mfrs Ass'n* v. *NLRB,* 386 U.S. 612, 627 (1967), gave its stamp of approval to the ally doctrine, as enunciated in *Business Machine:*

> The literal terms of § 8(b)(4)(A) also were not applied in the so-called "ally doctrine" cases, in which the union's pressure was aimed toward employers performing the work of the primary employer's striking employees. The rationale, again, was the inapplicability of the provision's central theme, the protection

[6] Petitioner submits that even if the Landrum Bill provision had been enacted, the result herein would be the same in light of the agreement between McDonald and its customers for the performance of struck-work.

> of neutrals against secondary pressure, where the secondary employer against whom the union's pressure is directed has entangled himself in the vortex of the primary dispute. '[T]he union was not extending its activity to a front remote from the immediate dispute but to one intimately and indeed inextricably united to it.' Douds v. Metropolitan Federation of Architects, 75 F. Supp. 672, 677 (DC SD NY 1948); see Labor Board v. Business Machine & Office Appliance Mechanics, 228 F2d 553 (CA2d Cir. 1955).

Finally, in the instant case, the Board was denied the preliminary injunction which it sought under § 10(l) of the Act, 29 U.S.C. § 160(l), on the ground that the ally doctrine was applicable. For the district court had little difficulty in concluding that Brown had allied itself sufficiently with McDonald so as to have divested itself of its neutral status and moved into McDonald's camp:

> The usual and customary arrangement when Brown bought from McDonald was for McDonald to deliver the stone to the job site specified by Brown. Brown and McDonald had had a rather substantial business relationship in the last year, transacting business of approximately $250,000.00 and in each other instance the material was bought and delivered to the job site by McDonald trucks.
>
> The arrangement made whereby Brown employed an independent hauler to bring the stone to the Bell Telephone job site was a departure from the prior practice of delivery of such products. This was the only time this method of purchase and delivery was followed.
>
> The arrangement through Brown for the pick up and delivery of McDonald stone resulted in a change in the usual price of the stone whereby the price of the stone was reduced by the cost of delivery to Brown.
>
> Under these circumstances, Brown made himself the ally of McDonald by knowingly making an arrangement for the pick up and delivery of the stone which work had customarily been done by some of the striking employees of the primary employer, McDonald.

> I therefore conclude that there was not a probable violation of Section 10(l) of the Act, based upon the 'Ally Doctrine' exception to Section of (sic) 8(b)(4) of the Act [*Davis* v. *Laborers' International Union of North America, Local 859, AFL-CIO,* C.A. 3-3072-B (unreported)].

From the foregoing, it appears that rather than applying the ally doctrine as it has been understood and adopted by Congress, the Supreme Court and by the district court in the instant case, the Board instead has attempted to distinguish this case from *Business Machine* on the totally artificial ground that here no money passed *directly* from McDonald to the independents. But it is clear that from an economic standpoint, the independent haulers actually were being compensated by McDonald, albeit through the device of a discount to its customers in the exact amount of their hauling charges.

In contrast to the Board's mis-application of the ally doctrine herein, on other occasions it has demonstrated its ability to apply the doctrine in a realistic manner. For example, in *Fox Valley Material Suppliers Ass'n,* 176 NLRB No. 51, 71 LRRM 1231 (1969), Rouse Construction Company was engaged by Landwehr to supply an operator to work on its construction project during a primary strike against Landwehr. An agent of the striking union induced an employee of Rouse to stop working on the job and threatened damage to Rouse's equipment if it was not immediately removed from the project. The Trial Examiner concluded that Rouse had no knowledge of Landwehr's primary dispute, and that since it had been performing struck-work "unknowingly," the ally doctrine was inapplicable.

But although the Board acknowledged that the literal language of *Business Machine* states that the performance of struck-work must be "knowing," it declared that

> [t]his is not to say, however, that the converse is true; namely, that one who 'unknowlingly' performs

> struck work for a given period will thereafter be insulated from pressure from the striking union. Rather, Royal Typewriter emphasizes that *it is the nature of the work performed by the employer furnishing services to the primary employer which is critical in determining whether that employer is a neutral or an ally of the primary employer* (emphasis added) (71 LRRM 1231, 1234).

And see *Auburndale Freezer Corp.*, 177 NLRB No. 108, 71 LRRM 1503 (1969).

The Board's failure to have correctly applied the ally doctrine herein is attributable to its erroneous effort to distinguish deliveries from other types of struck-work. Hence, the Trial Examiner declared as follows:

> Unquestionably, each of the secondary employers had the right to continue to purchase stone from McDonald. Surely too, each had the right to send any trucks it owned to McDonald's plant to pick up stone, assuming that its drivers would cross the picket line at the plant, and this right embodied the additional right to negotiate with McDonald a price for the stone f.o.b. the plant to replace the earlier price f.o.b. building site. I see no meaningful difference between these rights, on the one hand, and the arrangements made by the secondary employers with independent truckers, on the other (A. 12).

However, what the Board failed to consider is that where deliveries traditionally have been performed by employees of a struck primary, the assumption of these deliveries during a strike by a customer—particularly pursuant to an arrangement whereby the customer's hauling costs are to be borne by the struck primary—places the customer in the position of assisting the struck primary against the union by maintaining its delivery operation during the strike. And while the customer may have a "right" to do so, when he does he gives up his protected status as a neutral since he has directly "entangled himself in the vortex of

the primary's dispute" *National Woodwork Mfrs Ass'n* v. *NLRB, supra.*

For surely if McDonald's customers had sent their employees into McDonald's plant during the strike to perform production work customarily performed by McDonald's employees, there would be no question that such an arrangement would bring the ally doctrine into play. But there is no meaningful basis for distinguishing in-plant work from deliveries, since all such work tasks usually and customarily are performed by the striking employees under their union's certification covering such bargaining unit work. Hence, merely because customers may be capable of picking up goods with their own trucks at a supplier's place of business is not a sufficient basis for denying to striking employees the right to protect their unit work from such erosion. For here, McDonald's contracts with its customers called for *it* to make the deliveries.

That a union has the right to protect *delivery* work from being transferred outside of an existing bargaining unit through subcontracting or the performance of struck-work, has long been recognized by the Board and by this court as constituting protected primary activity.

Hence, in *Bert P. Williams, Inc.*, 148 NLRB 728 (1964), the struck primary was a beer distributor who permanently subcontracted its delivery operations during a strike. The union picketed the subcontractor, and the Trial Examiner found a violation of § 8(b)(4)(ii)(B) on the ground that the subcontracting agreement "did not call for the performance of struck work" since the secondary employer "would have received its contract even if there had been no strike" 149 NLRB 728, 743.

But the Board reversed. For notwithstanding the technical "chink" in the mechanical armor of the "struck-work-ally doctrine" found by the Trial Examiner, the Board concluded that in light of the permanent subcon-

tracting of the deliveries during the strike, the picketing of the trucks of the subcontractor "engaged in doing the work formerly done by [the struck primary's] employees was primary picketing and lawful" *Id.* at 733.

Similarly, in *Meat and Highway Drivers, Local 710* v. *NLRB (Wilson & Co.)*, 118 U.S.App.D.C. 287, 335 F.2d 709 (1964), involving the application of § 8(e) of the Act,[7] this court set aside a Board decision declaring unlawful a so-called "out-of-state-shipment" clause in a Teamsters contract, which required Chicago meat packers to bring their trucked-in meat shipments from out-of-state packing houses to their Chicago trucking terminals and then have their own local drivers deliver the meat to Chicago consignees. These local deliveries had previously been made by non-union, long-haul interstate carriers who brought the meat to Chicago. The Board held the clause to be unlawful under § 8(e) on the ground that it was intended to force the meat packers to assign work to local drivers which they had not performed in the past, and, therefore, it constituted unlawful secondary activity requiring the packers to cease doing business with the interstate carriers.

In reversing the Board, this court found that the union was primarily engaged in seeking to regain local delivery work which had at one time been done by local drivers in Chicago, and, therefore, the work was fairly claimable and subject to recapture by them through collective bargaining. Moreover, in holding in *Wilson* that the retention of delivery work and its protection from erosion was

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[7] 29 U.S.C. § 158(e), which provides in pertinent part as follows:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . . .

as much a subject of union concern as the protection of production work, this court declared as follows with regard to the so-called "primary-secondary" dichotomy:

> Resolution of the difficult issue of primary *versus* secondary activity, as it relates to this case, involves consideration of two factors: (1) jobs fairly claimable by the bargaining unit, and (2) preservation of those jobs for the bargaining unit. If the jobs are fairly claimable by the unit, they may, without violating either § 8(e) or § 8(b) (4) (A) or (B), be protected by provision for, and implementation of, no-subcontracting or union standards clauses in the bargaining agreements. *Activity and agreement which directly protect fairly claimable jobs are primary under the Act. Incidental secondary effects of such activity and agreement do not render them illegal.* Thus the 'cease doing business' language in § 8(e) cannot be read literally because inherent in all subcontracting clauses, even those admittedly primary, is refusal to deal with at least some contractors (emphasis added) (fns. omitted) (118 U.S.App.D.C. 287, 335 F.2d 709, 713-4).

Therefore, as applied herein, *Bert P. Williams* and *Wilson* stand for the proposition that for a struck employer to farm-out delivery work customarily performed within a struck bargaining unit entitles the striking employees involved to seek to recapture such work either through a contract clause or by picketing, and that economic activity directed against persons who have entered into arrangements with the struck employer for the performance of such work does not violate § 8(b)(4)(i)(ii)(B).

Although principally relied upon by the Board in support of its decision herein, *Catalano Brothers, Inc.*, 175 NLRB No. 74, 70 LRRM 1601 (1969), which also involved deliveries, is inapposite. Catalano was a trucking company which made deliveries for U.S. Gypsum, which, unlike McDonald, produced but did not deliver its own products. When the union representing Catalano's employees struck, Gypsum engaged a trucker named Quinn to make its deliveries.

The Board concluded that the union's picketing of Quinn and Gypsum violated § 8(b)(4)(i)(ii)(B) of the Act. It also found Gypsum and Quinn to be neutral secondary employers, and that neither the production of Gypsum's products nor the delivery thereof by Quinn constituted struckwork. But it is clear that no arrangement of any kind—direct or indirect—existed whereby Catalano provided for the performance of Gypsum's deliveries by Quinn during the strike. And it is the very absence of such an arrangement which distinguishes *Catalano* from the instant case. For when Gypsum realized that Catalano could not be depended upon to make its deliveries, it *totally abandoned* Catalano and arranged to have its deliveries made by Quinn.

A comparison of Gypsum's reaction to the Catalano strike with that of Byrne, Citadel and Brown to the McDonald strike points up this distinction. To have come within *Catalano,* Byrne, Citadel and Brown could have abandoned McDonald and gone elsewhere for stone during the strike, or they could have depended upon McDonald to see to it that the stone was delivered—perhaps through the hiring of independent haulers. Instead, they undertook to assist McDonald in maintaining the delivery aspects of its normal business during the strike through an arrangement which provided for an adjustment in the price of the stone which was directly related to their hauling costs. And having thus entered into an assistance pact with McDonald, they left the realm of neutrality and entered the zone of partisanship.

Further, by becoming the instruments for the introduction of independent haulers into the situation, the customers were also seeking to insulate themselves from the possibility of secondary radiations which might have befallen them if the independent haulers had instead been engaged by McDonald. For in such a case, the Union could have lawfully engaged in "truck-following" and

"roving-situs" picketing against such "ally" independent haulers in accordance with the Board's *Moore Dry Dock* standards, 92 NLRB 547 (1950). And such picketing which might have resulted in stoppages among the employees of the customers could not have been enjoined so long as the *Moore Dry Dock* standards were adhered to, since "however severe the impact of primary activity on neutral employers, it [is] not thereby transformed into activity with a secondary objective" *National Woodwork Mfrs Ass'n,* 386 U.S. 612, 627 (1967). Hence, the "arrangement" entered into herein actually may be seen as a convenient stratagem by McDonald and its customers to avoid these possible ramifications.

In concluding that the Union violated § 8(b)(4)(i)(ii)(B) of the Act herein, the Board also relied upon its decision in *Patton Warehouse, Inc.,* 140 NLRB 1474, 1483 (1963) for the proposition that the ally doctrine does not apply in "the absence of any arrangement between the struck and the secondary employers" (A. 3-4). In *Patton,* the Board considered the legality under § 8(e) of the Act [8] of a provision in a collective bargaining agreement intended to protect employees in their refusal "to perform any service, which, but for the existence of a controversy between a Labor Union and any other person . . . would be performed by the employees of such person" 140 NLRB 1474, 1482. The thrust of the clause was to protect employees in a refusal to perform struck-work. The Board acknowledged that the clause would be lawful where the relationship between the contracting employer and the employer with the labor dispute was so close as to render them "allies"; but it held the clause to be impermissibly broad since it "overlooks an essential requirement of the ally doctrine, namely, that the struck work must be transferred to a secondary employer through an arrangement with the primary employer" 140 NLRB 1474, 1483.

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[8] See n. 7, p. 23.

Upon review of the Board's Decision in *Patton,* this court agreed that the clause in question went beyond the scope of the ally doctrine. But at the same time, it declared that it would "refrain from defining the exact limits of the ally doctrine, however, and [would] not decide whether the *Business Machine* tests are adequate for all variations in factual situations. Such spelling out is best left for the elucidating process of gradual inclusion and exclusion provided by specific cases" *Truck Drivers Union Local No. 413, IBT* v. *NLRB,* 118 U.S.App.D.C. 149, 334 F.2d 539, 547 (1964), *cert. denied,* 379 U.S. 916 (1964).

In one such recent effort, *Carpet Layers Local 419* v. *NLRB,* —— U.S.App.D.C. ——, —— F.2d ——, 74 LRRM 2444 (June 12, 1970), this court remanded to the Board for further consideration a decision in which the Board found picketing of Sears and Roebuck to be unlawful in connection with a union's dispute with independent contractors who performed carpet and floor covering installations through an arrangement with Sears. In remanding, this court declared:

> Sears does not appear to be a neutral in an economic sense. The record suggests that Sears has a direct interest in whether the installers are unionized or not, for the operations of the two involved in this case appear to be very substantially integrated. Sears sells installed carpeting, not uninstalled carpeting with an outlet to independent contractors. The company not only makes a profit from the process of installation—it charges the customer what it pays the installers plus a markup—but the customer pays Sears for an installed carpet. Thus an important economic interest of Sears in the dispute of the Union is that to the extent Sears' carpeting is installed by non-unionized workers willing to perform services on an assigned, piecework basis instead of an hourly rate, Sears may gain a competitive advantage in the carpeting market in Denver. While the Board examined the economic relationship between Sears and the installers, its inquiry focused unduly in this respect upon whether the

installers were employees or independent contractors (fns. omitted) (74 LRRM 2444, 2447).

In the instant case, the customers of McDonald were similarly interested in the contract settlement to be arrived at between McDonald and the Union since it would ultimately be reflected in the price they would have to pay McDonald in the future for the supply and delivery of stone. But unlike the situation in *Carpet Layers*—in which Sears made no effort to aid the struck installers—in the instant case, McDonald's customers took direct steps to assist McDonald in continuing its deliveries. And such steps could not help but "inevitably tend to break the strike" *Business Machine,* 228 F.2d 553, 558. Hence, all the more reason herein than in *Carpet Layers* for this court to apply the ally doctrine.

Accordingly, the conclusion is inescapable that Byrne, Citadel and Brown became McDonald's allies and that they waived their status as neutrals, thus subjecting themselves to the Union's lawful economic pressures.

CONCLUSION

On the basis of the foregoing facts and circumstances, petitioner respectfully submits that this court should set aside the Board's Decision and Order.

Respectfully submitted,

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July, 1970

No. 24,098

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 859,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION TO REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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Statute:

UNITED STATES COURT OF APPEALS

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ON PETITION TO REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether the Board properly found that the Union engaged in unlawful secondary activity in violation of Section 8(b)(4)(i)(ii)(B) of the Act by picketing jobsites of Thomas S. Byrne, Inc., and The Citadel Construction Company, Inc., and by threatening Byrne and Dee Brown Masonry, Inc., all with an object of forcing or requiring persons to cease doing business with Acme Brick Company d/b/a McDonald Bros. Cast Stone Co.

COUNTERSTATEMENT OF THE CASE

This case is before the Court on petition of Laborers' International Union of North America, AFL-CIO, Local 859 (hereinafter referred to as the Union), to review an order of the National Labor Relations Board issued on December 18, 1969, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*, hereinafter referred to as the Act), and upon the cross-application of the Board to enforce its order. The Board's Decision and Order are reported at 180 NLRB No. 51 (A. 1-15).[1] This Court has jurisdiction over the proceeding under Section 10(f) of the Act.

I. THE BOARD'S FINDINGS OF FACT

In brief, the Board found that the Union violated Section 8(b)(4)(i)(ii)(B) of the Act by picketing the jobsites of Thomas S. Byrne, Inc. (hereinafter called Byrne) and Citadel Construction Company, Inc. (hereinafter called Citadel) and by threatening Dee Brown Masonry, Inc. (hereinafter called Brown) and Byrne, with an object of forcing them to cease doing business with Acme Brick Company d/b/a McDonald Bros. Cast Stone Co. (hereinafter called McDonald). The underlying facts, most of which are uncontroverted, are as follows:

A. Background

McDonald, a division of First Worth Corporation, is engaged in the building materials industry, and maintains offices and plants in Fort Worth, Texas (A. 6; 27, 33, 127). Byrne, Citadel, and Brown are contractors engaged in the building and construction industry. They purchase pre-cast

[1] References to portions of the testimony and exhibits printed as an appendix to the parties' briefs are designated "A." References preceding a semicolon are to the Board's findings; those following are to supporting evidence.

stone from McDonald, who usually delivers the stone to their respective jobsites (A. 2, 6, 7, 8, 9; 143, 151-153, 130-131).

On November 6, 1967, and April 21, 1969, the Union was certified as the bargaining representative of a unit of McDonald's production and maintenance employees, including truck drivers (A. 6; 56-57, 62, 28, 34). After negotiations between the Union and McDonald proved unfruitful, the Union, in July or August 1968, began an economic strike against McDonald, and commenced picketing both of the firm's plants in Fort Worth (A. 2, 6; 28, 34, 128-129, 63, 95-96).

B. The Union threatens to picket and pickets Byrne for using McDonald stone

On the morning of August 6, 1968, while Byrne was engaged as the general contractor on a construction project for the Star Telegram newspaper (A. 7; 89, 142), Byrne received a letter from the Union informing it that the Union was on strike against McDonald and that it intended to picket McDonald's trucks while they were on Byrne's premises (A. 2, 7; 157, 72-73, 142-143, 145). Byrne's president, James N. Patterson, then arranged with Bill Scroggins, an independent trucker, to pick up the required stone at McDonald's for delivery to the jobsite, and Scroggins dispatched his truck to McDonald's plant (A. 2, 3, 7; 143-147, 150). Byrne made an agreement with McDonald that the price of the stone would be reduced by the cost of delivery by Scroggins (A. 7; 151-152).

At about 11:00 on the same day, Patterson telephoned John Wallace, a Union agent, who stated he was about to call Patterson to inform him that Byrne's truck was at McDonald's plant to pick up some stone, and that if the stone was delivered at the jobsite the Union would "put a picket on the job" (A. 7; 75, 96-97, 128, 143-145). Patterson explained

to Wallace that the truck belonged to Scroggins, an independent trucker, and that there would be no McDonald truck or driver on Byrne's jobsite, but Wallace was not dissuaded from his expressed intention to picket (A. 7; 143-145). However, when Patterson told Wallace that Byrne needed only three pieces of stone that day, Wallace agreed not to picket (*ibid.*). He warned, though, that if Byrne brought more than three pieces of McDonald stone onto the jobsite, "he would put a picket on the job" (A. 2, 7; 145). Later that day, Scroggins delivered the three pieces of stone to the jobsite without incident (A. 7; 90-91, 94).

Also on August 6, Patterson sent a telegram to the Union confirming that "until further notice Thos. S Byrne, Inc., will purchase products from McDonald-Stone Products, Inc., F.O.B. McDonald plant. No truck, employee or sub-contractor of McDonald will be engaged in the delivery of products purchased by Thos. S. Byrne, Inc. to our job sites" (A. 7; 158, 73, 146). On the same day, G. G. Adams, Byrne's job superintendent, was told by Union Business Agent Lawrence O'Neil that "if you bring any more of McDonald stone on the job we are going to have to picket" (A. 2, 7; 75, 87, 90). Observing that "[t]here is not any McDonald employees on the job," Adams inquired on what grounds the Union would picket. O'Neil replied "for using their stone" (A. 7; 90).

On the next day, August 7, Scroggins' truck brought a load of McDonald stone to Byrne's jobsite (A. 8; 91-92). A man began picketing, as near to the truck as possible, with a sign reading (A. 2, 8; 91-95, 147-148, 149, 150, 159):

DON'T BUY PRODUCTS
OF
McDONALD STONE PRODUCTS
UNFAIR
To Laborer's Local Union #859
This Picketing is Directed Only
At Employees of McDonald Stone
Products
Laborer's Local Union #859

All of the about 60 employees then on the jobsite, approximately 40 of Byrne and 20 of another contractor, ceased work (A. 8; 147-148, 93-94). Patterson directed that the truck, still loaded, leave, and then telephoned Wallace and told him the truck had departed (A. 8; 147-148). Wallace arrived at the site and stopped the picketing (*ibid.*). The employees then returned to work (A. 8; 95). No McDonald employees or equipment were on the site during the picketing (A. 8; 151, 93).

Later that day, August 7, Byrne filed a charge (Board Case No. 16-CC-300) alleging the Union's violation of Section 8(b)(4)(i)(ii)(B) of the Act (A. 2, 8; 16).[2]

[2]On August 19, 1968, the Union and Byrne executed a settlement agreement, approved by the Regional Director, by which the Union agreed to post a 60-day notice stating that it would not "by picketing or other like or related conduct" induce or encourage any individual employed by Byrne "or any other person" to engage in a work stoppage to force Byrne "or any other employer or person" to cease doing business with McDonald, and that it would not "threaten, coerce or restrain" Byrne "or any other person" with an object of forcing or requiring him to cease doing business with McDonald (A. 2, 8; 38-39, 72, 128-129). The agreement also provided that the Union would comply with the terms and conditions of the notice (A. 8; 38-39).

C. The Union pickets Citadel for using McDonald stone

During December 1968, while Citadel was engaged in the construction of a dormitory at North Texas State University, Citadel made arrangements with an independent hauler, Ben Loper, to pick up stone at McDonald's plant and deliver it to the jobsite (A. 2, 3, 8; 114, 152-153). Citadel also provided with McDonald for reducing the contract price of the stone by the cost of transportation (A. 8; 152-153).

On December 27, Loper brought a load of stone to the jobsite (A. 8; 152, 114). Pickets appeared at the North and South gates of the site (A. 3, 8; 152, 104, 107). The picket signs were approximately the same as that used at the Byrne jobsite, referred to McDonald, not Citadel, and bore the Union's name (A. 8; 105-107). Frank Thomason, project manager for Citadel, spoke to the pickets and one of them said that Mr. Breeding, a Union agent, had sent him (A. 8; 104, 107-108, 113-114, 142-143). About 40 to 60 of Citadel's approximately 120 employees on the job quit work during the picketing (A. 8; 114, 153). Loper's truck was unloaded, and the picketing ceased when the truck left the site (A. 8; 111-112, 114, 152). There were no McDonald employees or trucks on the site (A. 8; 114, 152).

On January 2, 1969, Citadel filed an unfair labor practice charge against the Union (Board Case No. 16-CC-315) alleging violation of Section 8(b)(4)(i)(ii)(B) of the Act (A. 2; 18).[3]

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[3]On January 17, 1969, with the approval of the Regional Director, the Union executed a unilateral settlement agreement, providing it would post a notice that it would not "by picketing or other like or related conduct" induce employees of Citadel "or any other person" to engage in a work stoppage to force or require Citadel "or any other employer or person" to cease doing business with McDonald (A. 2, 9; 40-41, 66-67, 72, 128-129). The Union also agreed to comply with the terms and conditions

D. The Union threatens to picket Brown if it uses McDonald stone

During March of 1969, Brown was the masonry sub-contractor on a project in Dallas, Texas, for which it had contracted with McDonald for the purchase and delivery of stone valued at $115,000 (A. 2, 9; 130-131). Starting on March 3, and almost every day thereafter through at least March 13, Union agent Anthony Mullins sat in a station wagon across the street from the site (A. 3, 9; 78-79, 83-84, 137-139).[4] Mullins had been dispatched to Brown's jobsite by Union agent Wallace to observe if any McDonald trucks or products came on the jobsite, and had received instructions from Wallace as to when and how to conduct any picketing (A. 9; 98-99, 100). He did not picket the job, but he had in the station wagon a picket sign basically the same as the one exhibited at the Byrne jobsite, except that it did not state "Don't buy products of McDonald Stone Products" (A. 9-10; 73, 80-82, 84, 138-140).

On March 21, 1969, Dewitt Brown, Jr., owner of Brown, telephoned R. P. Vinall, an agent of the Union, and told him that Brown was about ready to have McDonald stone delivered and had arranged for an independent contract hauler to pick up and deliver the stone (A. 2-3, 9; 75, 128, 130, 131-132).[5] Brown, Jr., asked if Vinall intended to picket Brown, and

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of that notice (A. 9; 40-41). Citadel did not enter into this agreement because it felt the Union had violated its prior settlement agreement with Byrne (*supra*, n. 2) by its conduct against Citadel (A. 66-67).

[4]Mullins, a member of the Union, was a striking McDonald employee and was at times a picket captain in the dispute with McDonald (A. 9; 75, 100-101, 138). He was paid by the Union for the time he spent watching the Brown jobsite from the station wagon (A. 9; 100). On these facts, the Board concluded that Mullins was an agent of the Union (A. 3, 9).

[5]Brown had previously told McDonald that it would buy its stone F.O.B. McDonald's plant and that the price would be reduced by the cost of delivery (A. 2-3, 9-10; 133-136).

Vinall replied affirmatively, stating that the Union was "going to picket the stone whenever and wherever the opportunity presented itself" (A. 2-3, 9; 131-132).

On the following day, March 13, 1969, Brown's jobsite foreman approached Mullins as he sat in the station wagon across the street from the jobsite and asked if Mullins "was going to picket the job" (A. 9; 79-80). Mullins responded that he "would picket the stone truck or the stone if it arrived on the job" (A. 3, 9; 79-80). On the same day, Brown filed a Section 8(b)(4)(ii)(B) charge against the Union in Board Case No. 16-CC-327 (A. 3, 10; 20).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board, in agreement with the Trial Examiner, concluded that the Union violated Section 8(b)(4)(i)(B) of the Act by picketing the Byrne and Citadel jobsites with an object of forcing or requiring persons to cease doing business with McDonald, and violated Section 8(b)(4)(ii)(B) of the Act by threatening Brown and Byrne with an object of forcing them to cease doing business with McDonald (A. 2, 4, 13).[6] The Board's order requires the Union to cease and desist from encouraging employees of Byrne, Citadel, and any other employer to engage in a work stoppage, and from threatening, coercing or restraining Byrne, Brown or any other statu-

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[6]On March 18, 1969, following his investigation of the charge filed by Brown in Board Case No. 16-CC-327, the Board's Regional Director notified the Union that his approval of the Settlement Agreements in Board Cases Nos. 16-CC-300 and 16-CC-315 involving Byrne and Citadel, respectively, was withdrawn, and that the Settlements were set aside (A. 3, 9; 42). We show below (fn. 9) that the Trial Examiner properly permitted the General Counsel to litigate the pre-settlement Section 8(b)(4)(i)(ii)(B) allegations.

tory employer, where the object of any such conduct is to force or require any person to cease doing business with McDonald, and to post the usual notices (A. 4, 13-14).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE UNION'S PICKETING AND THREATS TO PICKET BYRNE, CITADEL AND BROWN VIOLATED SECTION 8(b)(4)(i)(ii)(B) OF THE ACT.

A. The unlawfulness of the Union's conduct

Section 8(b)(4)(i)(ii)(B) of the Act makes it an unfair labor practice for a union:

> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, . . . or otherwise handle or work on any goods, . . . or to perform any services; or
>
> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . .: *Provided*, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

These provisions reflect "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers

and others from pressures in controversies not their own." *N.L.R.B. v. Denver Building & Construction Trades Council,* 341 U.S. 675, 692 (1951).

While "the distinction between legitimate 'primary activity' and banned 'secondary activity' . . . does not present a glaringly bright line," *Local 761, International Union of Electrical, etc., Workers v. N.L.R.B. (General Electric),* 366 U.S. 667, 673 (1961), where the primary and secondary employers have separate work sites," it is a comparatively easy task . . . to determine that conduct amounts to secondary boycotting where, for example, strikers leave the premises of the struck employer to journey across the city to take up their signs at the premises of their employer's principle customer." *Local Union No. 519, United Ass'n of Plumbers,* ___ U.S. App. D.C. ___, 416 F.2d 1120, 1123-1124 (1969).

As set forth in the Counterstatement, the Union had a primary dispute with McDonald, who manufactured pre-cast stone and delivered it to its customers, including Byrne, Citadel and Brown. Upon being informed by the Union that it intended to picket McDonald trucks at Byrne's Star Telegram construction site, Byrne contracted to have an independent hauler deliver the McDonald stone, and immediately informed the Union of this arrangement. Nonetheless, Union agents Wallace and O'Neil threatened Byrne that if the stone was delivered to the jobsite, the Union would "put a picket on the job" (A. 145). The following day, when Scroggins, an independent hauler, arrived with a load of McDonald stone, the Union picketed the jobsite, causing a general work stoppage by employees of Byrne and another contractor. The picketing occurred at a time when the Union knew there were no McDonald employees or equipment present or scheduled to be present on the job. Likewise, the Union's picketing at Citadel's jobsite occurred while no McDonald employ-

ees or trucks were present or scheduled to be present, and caused a work stoppage by about 40 to 60 employees. Similarly, despite the fact that Brown expressly informed the Union that it had arranged to have all stone purchased from McDonald delivered by an independent carrier, Union Agent Vinall threatened "to picket the stone whenever and wherever the opportunity presented itself" (A. 131-132). In addition, Union Agent Mullins threatened to "picket the stone truck or the stone if it arrived on the job" (A. 79-80), and persisted in conspicuously parking across from the jobsite with the avowed purpose of picketing if any stone arrived. As we show below, on these facts, the Board properly concluded that the Union engaged in conduct proscribed by subparagraphs (i) and (ii) of Section 8(b)(4) for a purpose proscribed by paragraph (B) of that Section.

The legislative history of subparagraph (ii) of Section 8(b)(4) shows that by the use of the phrase "threaten, coerce or restrain" Congress intended both to foreclose threats of "labor trouble or other consequences,"[7] and to prohibit the carrying out of such threats by means of a "strike or other economic retaliation."[8] It is well settled, moreover, that picketing constitutes an inducement of employees to engage in a work stoppage. *I.B.E.W., Local 501 v. N.L.R.B.*, 341 U.S. 694, 700-705 (1951); *Local 761, International Union of Electrical etc., Workers v. N.L.R.B., (General Electric) supra*, 366 U.S. at 673. The Union's picketing of the Byrne and Citadel jobsites, therefore, clearly constituted inducement and pressure within the purview of sub-paragraphs (i) and (ii) of Section 8(b)(4), while the threats to picket Byrne and Brown fell within the scope of subparagraph (ii).

[7]II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (U.S. Gov't Print. Off. 1959) 1568(2) (105 Cong. Rec. 15552).

[8]*Id.*, at 1523(1), 1581(1) (105 Cong. Rec. 14347, 15544-15545).

It is also clear that the Union's conduct had "an object" of forcing Byrne, Citadel and Brown to cease doing business with McDonald. As this Court has stated, the determinative factor is "whether the effect on [Byrne, Citadel and Brown] was an objective of the [conduct] or was merely an incident of it . . . . Did the Union intend to place a boycott on [McDonald] alone, with only an incidental economic effect on [Byrne, Citadel and Brown], or did it intend to place a boycott on [the latter employers] along with [McDonald]? In the absence of admissions by the union of an illegal intent, the nature of the acts performed shows the intent." *Seafarers International Union, etc. v. N.L.R.B. (Salt Dome Production Company),* 105 U.S. App. D.C. 211, 216-217, 265 F.2d 585, 590-591 (1959), cited with approval, *Local 761, International Union of Electrical Workers v. N.L.R.B. (General Electric), supra,* 366 U.S. at 674. Manifestly, the Union's interference with the delivery of supplies to Byrne and Citadel, and its threat to picket Brown, at points remote from the locus of the actual dispute, and at times when the Union was on actual notice that no employees or equipment of McDonald would be involved in the deliveries, could have been intended only to enmesh those employers in the dispute and to force a cessation of business with McDonald. As the Fifth Circuit has observed, "There is simply no excuse for picketing where the message is seen by neutral employees of neutral employers, but is not seen at all by the employees of the primary employer. * * * Picketing that *has the effect* of interfering with the work of neutral third parties, and which *can not have the effect* of appealing to the employees of the primary employer can have no other purpose than that which was actually achieved . . ." (Emphasis in original.) *Brown Transport Corporation v. N.L.R.B.,* 334 F.2d 30, 39 (C.A. 5, 1964). Accord: *Local Union*

No. 519, United Ass'n of J. & D. Plumb., etc. v. N.L.R.B., supra; N.L.R.B. v. Local 282, Teamsters, No. 29,149, decided May 18, 1970, 74 LRRM 2289, 2296 (C.A. 2) (on contempt).

Under the principles outlined above, we submit that the Board properly found that the Union's conduct directed against Byrne, Citadel and Brown was secondary, and therefore violative of Section 8(b)(4)(i) and (ii)(B) of the Act.

B. The Board properly rejected the Union's reliance on the "ally" doctrine as a defense[9]

The Union argues in its brief that by arranging to have independent carriers perform the struck work of delivering McDonald stone to their respective jobsites, Byrne, Citadel and Brown became "allies" of McDonald and therefore lost their protected neutral status under the secondary boycott provisions of the Act.

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[9]Before the Board, the Union also contended that its conduct was "consumer picketing" directed solely against the struck product, McDonald precast stone, and was therefore protected in light of *N.L.R.B. v. Fruit & Vegetable Packers, Local 760,* 377 U.S. 58 (1964). The Union also contended that even if its conduct regarding Brown was violative of the Act, litigation of the conduct involving Byrne and Citadel was barred by the settlement agreements approved by the Regional Director in Board Cases Nos. 16-CC-300 and 16-CC-315. The Union has now apparently abandoned those arguments, for its brief to the Court makes no mention of them. In any event, the answer to the consumer picketing contention is supplied by *Glaziers' Local 558 v. N.L.R.B.,* ____ U.S. App. D.C. ____, 408 F.2d 197, 202 (1969), where this Court held, in analagous circumstances, that *Fruit Packers* was inapposite, since "the picketed product was not being sold on the premises [where the picketing occurred] nor [was] it likely that any potential buyers of [the product] would come to a construction site to inspect the [product] for a potential purchase." See also *N.L.R.B. v. Millmen's Local 550 (Steiner Lumber Company),* 367 F.2d 953 (C.A. 9, 1966). The Board's established rule that it may set aside a settlement agreement and bring a formal complaint proceeding where a respondent fails to abide by its agreement has received Supreme Court approval. *Wallace Corporation v. N.L.R.B.,* 323 U.S. 248, 254-255 (1944). This "has been interpreted to mean that a settlement agreement can be set

Under what is termed the "ally" doctrine, an employer who knowingly performs struck work for the account of the primary employer so aligns himself with the primary employer that he becomes subject to the same economic pressures as the primary.[10] This doctrine was first expressed by Judge Rifkind in *Douds v. Metropolitan Federation of Architects, Engineers, Chemists & Technicians, Local 231 (Ebasco)*, 75 F.Supp. 672 (S.D.N.Y., 1948), and was approved by the Second Circuit in *N.L.R.B. v. Business Machine and Office Applicance Mechanics (Royal Typewriter)*, 228 F.2d 553 (C.A. 2, 1955), cert. den. 351 U.S. 962.[11]

In the *Ebasco* case, Ebasco, a corporation engaged in the business of providing engineering services, had a close business relationship with Project, a firm providing similar services. Ebasco contracted some of its work to Project, and paid for time spent on that work by Project employees. When Ebasco's employees went on strike, Ebasco transferred a greater percentage of its work to Project, including some work already started by

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aside and presettlement violations found, when there has been a breach of the agreement or when there has been a subsequent independent violation of the Act by a party to the agreement." *N.L.R.B. v. Southeastern Stages, Inc.*, 423 F.2d 878, 880 (C.A. 5, 1970), citing, *inter alia, International Brotherhood of Teamsters, etc., Local No. 554 v. N.L.R.B.*, 104 U.S. App. D.C. 359, 362, n. 2, 262 F.2d 456, 459 (1958).

[10]A second aspect of the ally doctrine, not in issue here, is applicable where the operations of the primary and secondary employers are commonly owned and controlled or integrated to such an extent that the two may be regarded as a single-employing enterprise. See, for example, *Miami Newspaper Pressmen's Local 46 v. N.L.R.B.*, 116 U.S. App. D.C. 192, 322 F.2d 405 (1963); *Bachman Machine Co. v. N.L.R.B.*, 266 F.2d 599, 603-605 (C.A. 8, 1959); *Carpet Layers Local 419 v. N.L.R.B.*, No. 23223, decided June 12, 1970, 74 LRRM 2444, 2448-2449 (C.A.D.C.).

[11]Those decisions have received Supreme Court recognition. See, e.g., *National Woodwork Mfgrs. Ass'n v. N.L.R.B.*, 386 U.S. 612, 627 (1967).

Ebasco's employees. After Project refused to honor the striking union's request that it cease performing Ebasco's work, the union picketed Project, incuding some of its employees to cease working.

On these facts, Judge Rifkind refused to grant injunctive relief against the Union, declaring (75 F.Supp. at 676):

> Project cannot claim to be a victim of that weapon [a secondary boycott] in labor's arsenal. To suggest that Project had no interest in the dispute between Ebasco and its employees is to look at the form and remain blind to the substance. In every meaningful sense it had made itself a party to the contest. Manifestly it was not an innocent bystander nor a neutral. It was firmly allied to Ebasco and it was its conduct as ally of Ebasco which directly provoked the union's act.

In *Royal Typewriter,* the union called Royal's service personnel on strike after reaching an impasse in contract negotiations. Royal, which had several contractual arrangements with its customers under which it was obligated to perform services for them, advised its contract customers to select independent service companies to perform the work and to either send Royal a receipted bill for reimbursement or to bill Royal directly. There was evidence of only one instance where Royal directly contacted an independent to handle some of the service calls, but in most instances the customers sent Royal the unpaid bills and Royal paid the independents directly. The union picketed both Royal's customers who used the independents to perform the contract services and the independent service companies performing the work. Relying on the ally doctrine, and noting that ". . . it has been held that the common law does not proscribe union activity designed to prevent employers from doing the farmed out work of a struck employer," the Second Circuit concluded that "the picketing

of the independent typewriter companies was not the kind of secondary activity which Section 8(b)(4)(A) of the Taft-Hartly Act was designed to outlaw." 228 F.2d at 558.

The ally doctrine has been adopted by this Court. *New York Mailers' Union No. 6 v. N.L.R.B.*, 114 U.S. App. D.C. 370, 371, 316 F.2d 371, 372 (1963); *Truck Drivers Union Local No. 413, etc. v. N.L.R.B. (Patton Warehouse, Inc.)*, 118 U.S. App. D.C. 149, 156-157, 334 F.2d 539, 546-547 (1964), cert. denied, 379 U.S. 916; *Carpet Layers Local 419 v. N.L.R.B., supra*, 74 LRRM at 2449.

In support of its position, the Union argues (br. pp. 13-16) that the instant case is factually "almost indistinguishable" from *Royal Typewriter* so that the result there must also obtain here. The Union considers "irrelevant" the conceded factual differences in the two cases regarding the genesis and nature of the respective arrangements for the performance of the struck work. However, the essence of the ally doctrine is an attempt by the struck employer to diminish the economic impact of the strike on his business by arranging for the performance of the struck work for his account by secondary employers. Thus, a customer of a struck employer does not become the struck employer's ally merely because, on his own initiative, the customer seeks another source for the services normally performed by the struck employer. Rather than supporting the Union's position, *Royal Typewriter* actually lends support to the Board's determination that Byrne, Citadel and Brown were not allies of McDonald in his dispute with the Union. As we show below, the Court in *Royal Typewriter* drew a clear distinction between the status of the customers of the struck employer and that of the independent employers engaged to

perform the struck work. Finally, we show that the factual dissimilarities between the case at bar and *Royal Typewriter* are not "irrelevant," as the Union contends, but were sufficient to remove the instant case from the application of the ally doctrine.

That the ally doctrine is not so broad that it applies to all "struck work" is well settled. As this Court stated in accepting the validity of the principle, ". . . the cited legislative history shows at most an intent to preserve an 'exception' regarding *farmed-out* struck work." (Emphasis in original.) *New York Mailers' Union No. 6 v. N.L.R.B., supra,* 114 U.S. App. D.C. at 371, 316 F.2d at 372.[12] Accord: *Employing Lithographers v. N.L.R.B.*, 301 F.2d 20, 28 (C.A. 5, 1962); *N.L.R.B. v. Enterprise Association, Plumbers,* 285 F.2d 642, 645 (C.A. 2, 1960). In this respect, the Board has held, with the approval of this Court (*Truck Drivers Union Local No. 413, I.B.T. (Patton Warehouse, Inc.),* 140 NLRB 1474, 1483, enf. 118 U.S. App. D.C. 149, 157, 334 F.2d 539, 547 (1964), cert. denied, 379 U.S. 916) that:

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[12]As the Union correctly states (br., p. 18), the legislative history of the 1959 amendments to Section 8(b)(4) of the Act indicates a desire by the Congress to leave unchanged "the existing law as illustrated by such decisions as *Douds v. Metropolitan Federation of Architects [Ebasco]* . . . and *N.L.R.B. v. Business Machine & Office Appliance Mechanics Board [Royal Typewriter]* . . ." H.R. No. 1147 (the House Conference Report on S. 1555, the bill finally enacted into law), Legislative History *supra,* Vol. I., p. 942. But in characterizing the existing law as reflected in *Royal Typewriter,* both then Speaker of the House Rayburn, in a speech read into the Congressional Record, and then Senator John Kennedy and Representative Thompson, in their analysis of the bill referred to by the Union (br. pp. 17-18), took particular "note that the independent [repair company] did the work *not as an independent but for Royal's account. . . .*Since *Royal was asking the independent to help Royal break the strike by performing Royal's contracts for Royal's account,* it was only fair to allow the union to ask the independent's employees to help the union win by refusing to do the strikers' work." Leg. Hist., *supra,* Vol. II, pp. 1576(2), 1708(3)-1709(1) (emphasis supplied).

> . . . an essential requirement of the ally doctrine [is] that the struck work must be transferred to a second employer through an arrangement with the primary employer . . . [In] the absence of any arrangement between the struck and the secondary employer, the work previously performed by the struck employer may not be interfered with even though the secondary employees are performing a service which, but for the dispute, would customarily be performed by the employees of the struck employer.

Thus, a secondary employer acting independently in his own self-interest does not become an ally of the struck employer merely because his interests lead him to perform, or to have performed, work which is normally done by the primary employer. As the Board has stated, "A secondary employer faced with a strike against his supplier of services is not obliged to sit idly by lest he forfeit his status as a neutral; he may, without risking the protection Section 8(b)(4)(B) accords him . . . seek other suppliers, devise other methods, and employ other means to enable him to continue his business on as nearly normal a level as possible." *United Marine Division, etc., Local 333 (New York Shipping Association),* 107 NLRB 686, 708 (1954). Accordingly, ". . . a customer arranging for substitute services during a strike does not make himself or the substitute an 'ally' merely because he knowingly arranges for services and the substitute knowingly performs them. In the absence of a direct or indirect arrangement by the struck employer with the customer or secondary employer to have the work performed for its account, the secondary employers do not lose the protection afforded a 'neutral' under the Act." *United Marine Division, etc., Local 333 (D. M. Picton & Co., Inc.),* 131 NLRB 693, 699 (1961). Accord: *Local 379, Building Material & Excavators (Catalano Bros., Inc.),* 175 NLRB No. 74 (1969); *N.L.R.B. v. Enterprise Association, Plumbers, supra,* 285 F.2d at 645; *N.L.R.B. v. International Union of Operating*

Engineers Local 571, 317 F.2d 638 (C.A. 8, 1963). Cf. also *N.L.R.B. v. Western States Regional Council No. 3, Woodworkers*, 319 F.2d 655 (C.A. 9, 1963); *Truck Drivers Union Local No. 413, I.B.T. v. N.L.R.B. (Patton Warehouse, Inc.), supra.*

Recognition of this right of self-help is implicit in the *Royal Typewriter* decision, where the court, in refining the "ally" concept, observed that "where an employer is attempting to avoid the economic impact of a strike by securing the services of others to do his work, the striking union obviously has a great interest, and we think a proper interest, in preventing those services from being rendered." 228 F.2d at 558. The Court then characterized an employer as an ally of a struck employer when he "knowingly does work which would otherwise be done by the primary employer pursuant to an arrangement devised and originated by him to enable him to meet his contractual obligations." 288 F.2d at 558-559.[13] In his concurring opinion, Judge Learned Hand stated that "one does not make oneself a party to the dispute with a primary employer by taking over the business that the strike has prevented him from doing. On the other hand if a secondary employer, knowing of the strike, not only

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[13]The court added that "the result must be the same whether or not the primary employer makes any direct arrangement with the employers providing the services." 288 F.2d at 558-559. However, it is clear that the Court was merely adverting to the indirect nature of the primary employer's arrangements in that case. While McDonald, the primary employer in the instant case, granted a reduction in the price of his product to reflect the cost of delivery borne by his consumers, this was merely a recognition of the existing economic realities, i.e., his inability to perform a service which was included in the contract price of his products. As discussed, *infra*, the record is barren of any evidence that McDonald was either directly or indirectly responsible for the arrangements with the independent haulers herein, and certainly he did not "devise" or "originate" them.

accepts the customer of the primary employer but takes his pay, not from the customer, but from the primary employer, I do not see any relevant difference in doing so from accepting a subcontract from the primary employer, which would certainly forfeit the exemption." 288 F.2d at 562. Moreover, contrary to its finding regarding the union's picketing of the service companies who performed the struck work, the court found that the picketing of Royal's customers, who engaged those substitute services pursuant to an arrangement initiated by Royal, "was clearly secondary picketing with the object defined in Section 8(b)(4)(A)." 228 F.2d at 559. Thus, Royal's customers were not treated as allies of Royal, and did not lose their status as neutrals to the labor dispute.[14]

The instant case, unlike *Royal Typewriter,* does not present a situation in which a struck employer affirmatively farmed out his struck work. Here, there is no evidence of any arrangement, either direct or indirect, between McDonald and the independent haulers for the performance of McDonald's struck delivery work. Thus, it is clear that McDonald did not himself engage the independent haulers. It is equally clear that Byrne, Citadel and Brown did not act on behalf of McDonald or at his direction or suggestion in arranging for the delivery of the stone to their respective

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[14]The court observed that the union's interest in preventing the service companies from rendering the services "is more fundamental than the interest in bringing pressure on customers of the primary." 228 F.2d at 558. The court denied enforcement of the Board's order with respect to the customer picketing, not because the customers were deemed allies of Royal, but because, under then Section 8(b)(4)(A), only inducements of employees were proscribed, and the evidence demonstrated "neither intent to induce, nor effective inducement, nor even probable inducement of employees." 228 F.2d at 561. Of course, Section 8(b)(4) of the Act, as since amended by the Labor-Management Reporting and Disclosure Act of 1959, also makes it unlawful for a union "(ii) to threaten, coerce, or restrain any person . . ." with a proscribed object.

jobsites. In fact, there is no suggestion in the record that McDonald was even consulted regarding those arrangements, much less that he initiated or designed them. Rather, the evidence establishes that McDonald merely acknowledged the *fait accompli* of his customers' independent agreements with their respective contract carriers and acquiesced in his customers' requests to take delivery F.O.B. McDonald's plants as a concession to his inability to complete the transaction F.O.B. the construction sites.[15] "To bring these facts within the *Ebasco-Royal* doctrine would require a holding that [Byrne, Citadel and Brown were] somehow [McDonald's] agent[s], a holding that would fly in the face of reality." *N.L.R.B. v. Enterprise Association, supra,* 285 F.2d at 645.

The Union argues that ". . . McDonald's agreement to reimburse its customers for their exact hauling costs during the strike was the same as the commitment Royal made to its customers" (Union's brief, p. 16). What this argument overlooks is that in *Royal Typewriter,* Royal, the primary employer, itself initiated the substitute arrangement and directed its customers to have the struck work performed by other employers at Royal's expense. Moreover, in most cases the substitute service companies

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[15]C. Dewitt Brown, president and owner of Brown, testified as follows (A. 135-136):

> "I told the McDonald Stone Company that I was going to buy the material f.o.b. their plant, less my delivery costs due to the fact that this was a job that Southwestern Bell Telephone had no—this was over a dispute that was not between myself or Southwestern Bell, and I did not want to tie up Southwestern Bell's facilities . . . I felt that I could not afford to subject them to any labor disputes, and on the other hand I did have a contract to perform, and I had to execute the work on this job so as not to delay construction."
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> * * *
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> "I didn't ask him [McDonald] . . . I told them this."

were paid directly by Royal. In those circumstances, it was clear that Royal had indirectly "secur[ed] the services of others to do his work." 228 F.2d at 558. In the instant case, there are missing the crucial elements of design and implementation by McDonald, and an arrangement, either direct or indirect, between McDonald and the independent haulers who performed the struck work.

The other cases relied upon by the Union are inapposite. Thus, *Fox Valley Material Suppliers Association, Inc.*, 176 NLRB No. 51, 71 LRRM 1231 (1969), is a classic example of a struck employer "farming out" struck work directly to another employer to lessen the economic impact of the strike, and bears no resemblence to the case at bar. On the other hand, in *Auburndale Freezer Corporation*, 177 NLRB No. 108, 71 LRRM 1503 (1969), the Board, reversing the Trial Examiner, specifically concluded that the ally doctrine was not the applicable principle but that the dispositive issue was whether the secondary employer's warehouse was a common situs. *Brewery Workers and Bert P. Williams, Inc.*, 148 NLRB 728 (1964), is relevant only to the limited extent that the Board there applied the ally doctrine to delivery work, which was farmed out by the primary employer. The Board concluded that the primary employer's decision to contract out his delivery operations was "caused by the failure or imminent failure of collective bargaining negotiations with [the union] and represented an attempt by [the primary] to insure continuance of beer deliveries notwithstanding the strike by its own employees." 148 NLRB at 733. *Meat & Highway Drivers, Dockmen, etc. v. N.L.R.B. (Wilson & Co.)*, 118 U.S. App. D.C. 287, 335 F.2d 709 (1964), arose under Section 8(e) of the Act and is similarly limited in relevancy to the proposition that delivery

work may be bargaining unit work and therefore a legitimate subject of primary economic pressures.[16]

In sum, the authorities fully support the Board's finding that Byrne, Citadel and Brown were not allies of McDonald. Therefore, the Union's attempt to involve those employers in its dispute with McDonald violated the Act's secondary boycott provisions, for "it is from just this harm where it is an avoidable and unnecessary consequence of the essential aims of the primary strike, that Section 8(b)(4)[(B)] was designed to shield neutral employers." *United Steelworkers of America, AFL-CIO v. N.L.R.B.*, 289 F.2d 591, 595 (C.A. 2, 1961). Accord: *Local Union No. 519, United Association of J. & A. Plumbers, etc. v. N.L.R.B., supra*, 416 F.2d at 1123.

[16] *Carpet Layers Local 419 v. N.L.R.B., supra*, also cited by the Union, merely suggests that two employers, although independent from an ownership and control standpoint, might have a business relationship in which their operations are so substantially integrated and financially interdependent that the distinction between primary and secondary would be obliterated. This aspect of the ally doctrine is not involved in the instant case (see n. 10, *supra*).

CONCLUSION

For the foregoing reasons, the petition to review should be denied and the Board's order should be enforced in full.

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